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CASE 12.650

REPORT ON MERITS

HUGO HUMBERTO RUIZ FUENTES AND FAMILY MEMBERS
GUATEMALA

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1. On January 2, 2003, the Commission received information from the Center for Justice and International Law (CEJIL), the Institute for Comparative Studies in Penal Sciences of Guatemala (ICCPG) and Public Defender Reyes Ovidio Girón of the Institute for Public Criminal Defense of Guatemala (hereinafter “the petitioners”), about criminal proceedings in which Hugo Humberto Ruiz Fuentes (hereinafter “the alleged victim”) was sentenced to the death penalty. The petitioners submitted the information in the context of Case 12.402, concerning application of the death penalty on Ronald Ernesto Raxcacó Reyes and requested Hugo Humberto Ruiz Fuentes to be included as a victim. Because at the time of this request, the Commission had already issued a ruling on admissibility in Case 12.402, it decided to process the information pertaining to Mr. Ruiz Fuentes as a separate case.

2. The petitioners argued that several due process violations were committed during the criminal case culminating in the death sentence of the alleged victim. They further contended that the alleged victim endured acts of torture during his time in custody. Lastly, they claimed that Mr. Ruiz Fuentes was extrajudicially executed, after escaping from jail in 2005.

3. The State of Guatemala (hereinafter “the Guatemalan State,” “the State” or “Guatemala”) argued that due process rights were respected during the criminal proceedings against the alleged victim. Guatemala denied that Mr. Ruiz Fuentes had been tortured and asserted that the injuries endured by him were caused by a fall he sustained when attempting to escape at the time of his arrest. As for the alleged extrajudicial execution, it contended that it is investigating what took place with due diligence.

4. The Commission concludes that the State of Guatemala is responsible for violation of the rights to life, humane treatment, a fair trial and judicial protection, as established in Articles 4.1, 4.2, 4.6, 5.1, 5.2, 8.1, 8.2 c), f), g), h) and 25.1 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) in connection with the obligations set forth in Articles 1.1 and 2 of the same instrument, to the detriment of Hugo Humberto Ruiz Fuentes. The Commission also concludes that the State of Guatemala is responsible for violation of the right to humane treatment, a fair trial and judicial protection, as provided for in Articles 5.1, 8.1 and 25.1 of the American Convention in connection with the obligations set forth in Article 1.1 of the same instrument, to the detriment of the next of kin of Hugo Humberto Ruiz Fuentes. Lastly, the Commission concludes that the State of Guatemala violated Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter “IACPPT”).

I. PROCEEDINGS BEFORE THE COMMISSION

A. Case proceedings since the admissibility report

5. On January 2, 2003, the Commission received the information about the alleged victim and subsequently registered it as a petition, under the number 652/04. Processing up to the time of the decision on admissibility is explained in detailed in Report No. 14/08.¹ In said report, the IACHR found the petition admissible as to potential violation of the rights enshrined in Articles 4, 5, 8.1 and 25 of the American Convention, in connection with Article 1.1 of the same instrument and Articles 1, 6 and 8 of the IACPPT.

6. On March 24, 2008, the Commission notified the parties of the report on admissibility. Additionally, pursuant to its Rules of Procedure, the IACHR placed itself at the disposal of the parties in order

¹ IACHR, Report 14/08, Petition 652/04, Admissibility, Hugo Humberto Ruiz Fuentes, March 5, 2008.

to reach a friendly settlement and requested both parties to submit their observations in this regard as soon as possible. Lastly, it requested the petitioners to submit their additional observations on the merits within a two-month period.

7. On June 23, 2008, the petitioners submitted their additional observations on the merits, which were forwarded to the State on July 14, 2008, granting it a two-month period to submit its observations on the merits. On September 8, 2008, the State submitted its additional observations on the merits, which were forwarded to the petitioners. Subsequently, the Commission continued to receive communications from the petitioners and from the State, which were duly forwarded to the opposing party.

8. In the case at hand, the Commission placed itself at the disposal of the parties to reach a friendly settlement, though neither party expressed interest in entering into such a process.

B. Proceedings for provisional measures

9. At the request of the Inter-American Commission, on August 30, 2004, the Inter-American Court of Human Rights (hereinafter the “Inter-American Court” or “the Court”) decided to require the State of Guatemala to:

(...) adopt, without delay, the measures necessary to protect the lives of Ronald Ernesto Raxcacó Reyes, Hugo Humberto Ruiz Fuentes, Bernardino Rodríguez Lara and Pablo Arturo Ruiz Almengor in order to not hamper the processing of their cases before the Inter-American human rights protection system.

10. The Court granted the request for the provisional measures warning that if the State executed the alleged victims “it would cause an irreversible situation and would be engaging in conduct [that is] incompatible with the object and purpose of the Convention.” On November 8, 2005, the State advised the Court that in October 2005, nineteen convicts, including Mr. Ruiz Fuentes, had escaped from the maximum security prison of Escuintla, known as “the Little Hell” (el Infiernito), prompting it to request suspension of the provisional measures granted on his behalf, since he was no longer being held in custody.

11. On November 16, 2005, the representatives reported that of the nineteen individuals, who had escaped from the jail “three persons had been captured, and another three have been executed at the time of their capture, including Mr. Ruiz Fuentes.” On July 4, 2006, the Court decided to lift the provisional measures on behalf of Mr. Ruiz Fuentes, on account of his death.

II. POSITION OF THE PARTIES

A. Position of the petitioners

12. The petitioners contended that the alleged victim was arrested, tortured and then subjected to a criminal proceeding for kidnapping the minor child Pedro Alberto de León Wug on August 5, 1997. They asserted that Mr. Ruiz Fuentes was found guilty and given the death penalty on May 14, 1999 by the Sixth Criminal Sentencing Court. They recount that the alleged victim escaped “the Little Hell” jail and was extrajudicially executed as part of the operation known as “Plan Gavilán.” They contended that these crimes remained in impunity.

13. With respect to his arrest, the petitioners claimed that on August 6, 1997, the alleged victim was arrested along with another person while he was driving his vehicle, after being intercepted by three vehicles driven by agents of the National Civilian Police belonging to the Criminal Investigation Service (SIC). They argued that after being arrested, the alleged victim’s eyes were covered, he was handcuffed with plastic ties and was not advised of his constitutional rights or placed at the disposal of a competent judge. They also contended that the alleged victim was subsequently tortured by state’s agents and required emergency

medical assistance to save his life. They claimed that these acts of torture were reported on several occasions but the State never conducted an investigation into them.

14. As for his conviction, they contended that the alleged victim was sentenced to die for the crime of kidnapping, which runs afoul of the American Convention, inasmuch as the crime of kidnapping did not lead to the death penalty in instances when the victim of the kidnapping did not die, at the time of ratification of the American Convention by Guatemala.

15. The petitioners also claimed that the alleged victim was held in custody awaiting execution of the death penalty for a period of 8 years, in the Maximum Security Prison of Escuintla and at the Preventive Facility for Men of Zone 18, and his conditions of detention were extremely severe, amounting to a “death row.”

16. Lastly, they recounted that the alleged victim escaped from prison on October 22, 2005, and that a recapture operation known as “Plan Gavilán” was mounted, during which the alleged victim and other persons were executed on November 14, 2005.

17. The details regarding the facts and the criminal proceeding will be explained in the Commission’s factual analysis section, based on the information provided by both parties. In this section, we provide a summary of the major legal allegations raised by the petitioners during the merits stage.

18. The petitioners argued that the State committed several violations of the human rights of the alleged victim in the context of the arrest and detention, criminal proceedings and conviction. Concretely, they claimed that his **right to personal freedom** was violated because the alleged victim was held in custody for a period longer than that permitted by law and without a judicial custody order, even though he was not caught in the act of the commission of a crime. They further contended that **the right to humane treatment and the prohibition of torture** were violated because the alleged victim was tortured at the time of his arrest. They further argued that an adequate investigation was not conducted into these incidents.

19. They claimed that the **right to life** was violated because of the death penalty conviction, as well as the extrajudicial execution of the alleged victim. As for the death penalty, they contended that it was applied by expanding the elements of the crime of abduction or kidnapping, in violation of the American Convention. With respect to the extrajudicial execution, they argued that the State is also liable because the investigation has been marred by several shortcomings such as evidence tampering.

20. Lastly, they asserted that the **right to humane treatment** was violated to the detriment of the alleged victim’s next of kin, because they have been the targets of harassment in their quest for justice, and because of the suffering inflicted on them by the arrest, torture and death sentence of their loved one.

B. Position of the State

21. The State claimed that the alleged victim was not tortured at the time of his arrest and asserted that based on the National Civilian Police investigator’s on-site inspection report about the arrest of the alleged victim, Hugo Humberto Ruiz Fuentes, when Mr. Ruiz Fuentes and another person noticed the presence of police agents they shouted “here comes the police” and attempted to escape by jumping an 8-meter high wall bordering a vacant lot in the back of the property. It asserted that as a result of said fall, the alleged victim endured several injuries and was consequently transferred to Roosevelt Hospital emergency room. They argued that the police report sets forth clear evidence of compliance with the provisions of the Constitution pertaining to notification of the cause of arrest and the rights of the detainee. The State argued that on August 7, 1997, the 10th Judge of the Criminal Justice of the Peace convened a hearing at Roosevelt Hospital in order to take the preliminary statement from the alleged victim.

22. The State denied that the death penalty conviction of the alleged victim violated Article 4 of the American Convention, on the grounds that even though he was sentenced to the death penalty for the crime of kidnapping, he escaped from prison without the punishment being executed.

23. As for the death of the alleged victim after escaping from prison, the State contended that the circumstances of his death have yet to be clarified and that, consequently, the Ministry of Public Prosecution opened a criminal investigation in which an arrest warrant was issued against an officer of the National Civilian Police.

24. Regarding personal freedom, the State argued that in the instant case there was no violation of the **right to personal liberty** because all statutory requirements were met during the arrest of the alleged victim, with respect to notification of the cause of arrest and the rights of the detainee.

25. The State also contended that there was no violation either of the **right to humane treatment** and denied that the alleged victim had been tortured, on the grounds that the injuries were sustained by him as a consequence of a fall when he attempted to escape at the time of arrest and, consequently, had to be hospitalized.

26. It denied the violation of the **right to life**, on the grounds that even though the Inter-American Court noted in the case of Raxcacó Reyes that the State expanded the range of offenses punishable by the death penalty, in violation of the American Convention, this is not applicable to the instant case because the punishment was not executed. It further argued that under the Inter-American Court's order to the State of Guatemala, in the context of the provisional measures, through a resolution of February 15, 2005, it temporarily suspended execution of the alleged victim's death penalty; nonetheless, on October 22 of that same year, he escaped from the maximum security jail where he was being held.

27. As to the alleged extrajudicial execution, the State provided information about "Plan Gavilán" and noted that there is an ongoing diligent investigation, wherein an order was issued for the arrest of a National Civilian Police officer. It also claimed that the investigation has been conducted with due diligence. As of the present date, the State has not reported on the outcome of the investigations related to the alleged extrajudicial execution of the alleged victim.

III. PROVEN FACTS

A. Domestic proceedings against the alleged victim

1. Arrest and allegations of torture

28. Based on records in the case file, the alleged victim was arrested on August 6, 1997 by investigator Victor Hugo Soto Diéguez and other members of the Police.² The petitioner contended that Mr. Ruiz Fuentes was tortured at the time of his arrest. The State denied this argument and claimed that injuries endured by him were the result of an attempted escape when he was about to be arrested, when he jumped from an eight-meter high wall.

29. The available information about the accounts of the circumstances surrounding the arrest is described hereunder.

30. According to the Official Letter from the department of criminal investigations of the National Police, Mr. Ruiz Fuentes was located in a residence, along with other individuals, and when said premises were surrounded, Mr. Ronald Raxcacó Reyes and the alleged victim shouted "here comes the police," they climbed a wall that borders the back of the house and "jumped down to the vacant lot from a wall approximately eight meters high." In the official letter, it is noted that as a result of the fall, the alleged

² Annex 1. Official Letter from the department of criminal investigations of the National Police to the Second Justice of the Peace of the Municipality of Mixco.

victim “received multiple injuries” and consequently was taken to Roosevelt Hospital where he was diagnosed with “multiple trauma.”³

31. Additionally, on April 29, 1998, Hugo Humberto Ruiz Fuentes provided his statement as defendant,⁴ giving a different account of the events from the account above regarding his arrest. He asserted that he was driving a vehicle with Mr. Jorge Mario Murga in an area identified as Bosques de San Nicolás, in Guatemala City, when he was intercepted by two vehicles and then he was put into a beige van, after which, in his own words: “me eyes were covered up and I was cuffed with plastic ties, I was carried up and down, I was beaten in my intestines, ribs and I was asked about several kidnappings since I didn’t tell them anything I was hit, then in mid afternoon I can’t remember but about three hours I was taken to an unknown house where they took me out, with my pants and underwear down, they threw me off the van, a tall man was at the location I believe he is DON CONTE COJULUN and he told them to get me up because I could die (...) they took me to the hospital in a pick up of Ciprosi (...) after about three days of being in the hospital a man came who claimed to be police chief SOTO (..) and they came three times, then another three came as private individuals y they brought me juices, telling me to not say anything about what had happened to me, that I should say that I had fallen from a house where I had jumped (...).⁵

32. When asked in said statement whether he was beaten after his capture, he indicated “I was captured and they started to beat me in the stomach and the ribs and they put me into the car and they beat me with a stick that had like a sponge on it because I only felt the pain inside and as a consequence of that they burst my intestine and that’s why I was with a colostomy bag for seven months.”⁶

33. Based on the foregoing, the alleged victim’s attorney requested in said act, “to conduct an investigation by the appropriate person into the reported incidents that constitute a crime of torture pursuant to Article 201 bis of the Criminal Code.”⁷

34. Furthermore, based on a medical report of December 9, 1997, the alleged victim entered Roosevelt Hospital “for acute abdomen on 08/08/97” (...) and after an exploratory laparotomy it was noted that there were findings of “Hemoperitoneum,” “multiple contusions and erosions of the mesentery of the small intestine,” “laceration of the transverse mesocolon which leaves without a segment of more or less 10 cms to more or less 15 cms of the splenic flexure,” “bleeding greater omentum vessels” and hepatic trauma G-I in segment VI.s”⁸

35. Similarly, based on the medical report of Fernando Alonso of January 20, 1998, the patient was admitted to Roosevelt Hospital in August 1997 “presenting CLOSED ABDOMEN TRAUMA, HYPOTENSE patient was taken to the operating room, finding HEMOPERITONEUM OF 1000 cc. Multiple Contusions and Erotion [sic] in mesentery of Small Intestine, Segment of Transverse Colon without Irrigation with Irreversible Vascular Changes, as well as GRADE 1 HEPATIC TRAUMA in Segment VI and therefore Resection of Transverse Colon Segment and DOUBLE BARREL OPENING COLOSTOMY performed.”⁹

³ Annex 1. Official Letter from the department of criminal investigations of the National Police to the Second Justice of the Peace of the Municipality of Mixco.

⁴ Annex 2. Statement of Hugo Humberto Ruiz Fuentes given to the Eighth Trial Court Judge for Criminal and Drug-Related Matters and Crimes against the Environment, on April 29, 1998.

⁵ Annex 2. Statement of Hugo Humberto Ruiz Fuentes given to the Eighth Trial Court Judge for Criminal and Drug-Related Matters and Crimes against the Environment, on April 29, 1998.

⁶ Annex 2. Statement of Hugo Humberto Ruiz Fuentes given to the Eighth Trial Court Judge for Criminal and Drug-Related Matters and Crimes against the Environment, on April 29, 1998.

⁷ Annex 2. Statement of Hugo Humberto Ruiz Fuentes given to the Eighth Trial Court Judge for Criminal and Drug-Related Matters and Crimes against the Environment, on April 29, 1998.

⁸ Annex 3. Medical report of Hugo Humberto Ruiz Fuentes of December 9, 1997.

⁹ Annex 4. Report of resident doctor of the Department of Surgery of Roosevelt Hospital, January 20, 1998.

36. According to another medical report of February 13, 1998, Mr. Ruiz Fuentes had to be operated for “closing of colostomy.”¹⁰

37. A third medical report of December 11, 2000, reads that Mr. Ruiz Fuentes “was brought by firemen with a story of being beaten” and attested that “he presents multiple injuries and contusions at the level of the abdomen, abdomen rounded and painful to the touch,” “and therefore he was taken to the Operating Room.”¹¹

38. On May 21, 2008, Doctor Alejandro Moreno of the organization *Physicians for Human Rights* issued a report at the request of the petitioner of the case, wherein he stated that after reviewing the documents that were forwarded to him¹² he notes that:

A. The intra-abdominal lesions that were suffered by Mr. Ruiz Fuentes are consistent with those cause by a blunt instrument as the medical reports and the witnesses’ statements describe; B. There is certain forensic evidence, such as the absence of cranial-encephalic trauma and of fractures of the extremities, which supports the version of events recounted by Mr. Ruiz Fuentes that he was beaten repeatedly in the abdomen and not the account of the police officers that Mr. Ruiz Fuentes fell from 5 to 8 meters high; C. The blunt instrument is the cause of the direct or indirect injuries from a solid object against a body and the harm may be external and/or internal.¹³

39. The Commission notes that in the judgment of conviction, which will be described subsequently in this report, it is deemed as proven fact that the lesions endured by the alleged victim were the consequence of jumping from a wall while attempting to flee the police. In this regard, said judgment notes that “defendants Ronald Ernesto Raxcacó Reyes and Hugo Humberto Ruiz Fuentes, when noticing the presence of the National Civilian Police, attempted to get away, jumping from the rear wall of the property where they were caught, and were arrested in the environs of the property by agents of the National Civilian Police, who had cordoned off the area.”¹⁴

40. The available information shows that the foregoing conclusion was not the product of any investigation relating to the alleged victim’s reports of torture. On the contrary, the available information indicates that no investigation at all was opened into such incidents.

2. Context of the application of the death penalty in Guatemala

41. The death penalty is established in Guatemala in both the Constitution and in criminal law. Article 18 of the Political Constitution of Guatemala of 1985, reads as follows:

Death penalty. The death penalty shall not be imposed on the following:

- a. Cases based on speculation;

¹⁰ Annex 5. Report of the forensic medicine department of the Judicial Agency, February 13, 1998.

¹¹ Annex 6. Medical report on Hugo Humberto Ruiz Fuentes of December 11, 2000. Annex 2 to petitioners’ submission of July 12, 2007.

¹² In this regard, it is noted that he was able to review 6 documents: 1. Record of arguments C-4-98 Clerk 1 of the Sixth Court for Criminal Sentencing, Drug-Related Activities and Crimes against the Environment of April 20, 1999; 2. Medical report of Roosevelt Hospital of December 9, 1997; 3. Medical report of Roosevelt Hospital of January 20, 1998; 4. Medical report of Roosevelt Hospital of December 11, 2000; 5. Statement of Hugo Humberto Ruiz Fuentes before the 8th Trial Court Judge for Criminal Sentencing, Drug-related Activities and Crimes against the Environment of April 29, 1998; 6. Six photographs of the property located at 2nd street lot 77, Zone 6 of Mixco, Diez de Mayo Neighborhood. Annex 7. Report of Alejandro Moreno addressed to Alejandro Rodríguez Barillas of May 21, 2008.

¹³ Annex 7. Report of Alejandro Moreno addressed to Alejandro Rodríguez Barillas of May 21, 2008.

¹⁴ Annex 8. Judgment of conviction issued by the Sixth Court for Criminal Sentencing, Drug-Related Activities and Environmental Crimes of Guatemala, May 14, 1999.

- b. Subjects older than the age of 60;
- c. Prisoners guilty of committing political crimes and common crimes related to politics;
- d. Prisoners whose extradition has been granted based on that condition.

All pertinent legal remedies can be sought against a sentence imposing the death penalty, including cassation, which must always be admitted for processing. The death penalty will be carried out once all the remedies are exhausted. The Congress of the Republic can abolish the death penalty.¹⁵

42. Likewise, the Penal Code establishes in Article 43 that:

The death penalty is extraordinary in nature and can only be applied to cases where it is expressly provided for by law and shall not be carried out until all legal remedies have been exhausted.

The death penalty shall not be imposed:

1. For political crimes
2. When the conviction is based on speculation
3. On women
4. On men over the age of 70
5. On individuals whose extradition has been granted based on that condition.

In these cases, and where the death penalty has been commuted to prison, the maximum prison sentence will be applied.¹⁶

43. Additionally, the crime of abduction or kidnapping provided in Article 201 of the Guatemalan Criminal Code, as it was defined at the time of Guatemala's ratification of the American Convention established the following: "abduction and kidnapping of a person for the purpose of securing a ransom, exchange for third persons or another illicit purpose of an equal or analogous significance, shall be punished with a prison term of eight to fifteen years in prison. The death penalty shall be imposed on the perpetrator, when as a result of or on the occasion of the abduction or kidnapping the abducted person dies."¹⁷

44. The definition of said criminal offense was amended under Decree 38-94 as follows:

The abduction or kidnapping of a person for the purpose of securing ransom, remuneration, exchange for third persons, as well as any other illicit or lucrative purpose of equal or analogous characteristics and identity, shall be punished with a prison term of twenty-five to thirty years.

The death penalty shall be imposed in the following instances:

- a. If minors under the age of 12 years old or persons over the age of sixty years old are involved.
- b. When as a result of or on the occasion of the abduction or kidnapping, the kidnapped person is left gravely or very seriously injured, with emotional or psychological trauma or dies.

¹⁵ Political Constitution of Guatemala of 1985.

¹⁶ Decree 17-73, Penal Code of Guatemala.

¹⁷ Decree Number 17-73, Criminal Code of Guatemala.

The respective punishment may be abated for any perpetrator of this crime who repents in any of its stages or provides information to achieve a felicitous solution to the abduction or kidnapping.¹⁸

45. Subsequently, this article was amended under Decree 14-95, as follows:

The death penalty shall be applied to principal perpetrators of the crime of abduction or kidnapping of one or more persons for the purpose of securing ransom, exchange for persons or making of any decision against the will of the kidnapped person or for any other similar or equivalent purpose. In this instance, no mitigating circumstance shall be assessed. Accomplices before and after the fact or any other participants in the commission of this crime shall be punished with a prison term of fifteen to twenty-five years. The death penalty shall be applied to any accomplices before or after the fact or any other participants in the commission of the abduction or kidnapping, who has threatened to kill the kidnapped person.¹⁹

46. Under Decree Number 81-96, the content of said article was amended as follows:

The death penalty shall be applied to principal perpetrators and masterminds of the crime of abduction and kidnapping of one or more persons for the purpose of securing ransom, exchange for persons or making of any decision against the will of the kidnapped person or for any other similar or equivalent purpose, and should it not be able to be imposed, a prison term of twenty-five to fifty years shall be applied. In this instance, no mitigating circumstances shall be assessed. Accomplices before and after the fact shall be punished with a prison term of twenty to forty years. Those convicted to prison for the crime of abduction or kidnapping shall not be granted any reduction of sentence for any reason.²⁰

47. In 2000, under Decree 17-2009, the following paragraph was added to Article 201, which set forth the crime of abduction or kidnapping:

Likewise, anyone who threatens in an imminent way or deprives another person of his or her liberty against his or her will, regardless of the time that said deprivation of liberty lasts or deprives the person of his or her rights of movement with a risk to the life or property of the person, with danger of causing physical, psychological or material harm, in any form or means, commits this crime and shall be punished with a prison term of twenty (20) to forty (40) years and a fine of fifty thousand (Q.50,000.00) to one hundred thousand Quetzales (Q.100,000.00).²¹

48. Although this is established in Guatemalan law, according to a report from Amnesty International, the death penalty was rarely applied in Guatemala before the 1990s. The report states that in 1982, four executions were carried out in application of the death penalty, with another 11 taking place in 1983 by virtue of Emergency Decree 46-82, promulgated during the martial law imposed by Efraín Ríos Montt.²²

¹⁸ Decree Number 38-94 of the Congress of the Republic of Guatemala.

¹⁹ Decree Number 14-85 of the Congress of the Republic of Guatemala.

²⁰ Decree Number 81-96 of the Congress of the Republic of Guatemala.

²¹ Decree Number 17-2009 of the Congress of the Republic of Guatemala, Law Strengthening Criminal Prosecution.

²² Amnesty International. Guatemala, The return of the death penalty. March 1997; also see IACHR, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.98/Doc.10, September 28, 1984, Guatemala para. 9.

49. In the 1990s, the Guatemalan State began to apply the death penalty again, first using firing squads in accordance with Decree 234 of the Congress of the Republic, and then through lethal injections²³ after Decree 234 was replaced by Decree 100-96 of November 1996, establishing this new method of execution. The decree regulates lethal injection in its Article 7.²⁴

2.1 Petition for clemency and the repeal of Decree 159 of 1892

50. As of the time the facts of this case, the last remedy available under Guatemalan legislation to challenge the imposition of the death penalty was the petition for clemency, provided for by Decree 159 of the National Legislative Assembly of April 19, 1892. The petition for clemency gave the President of the Republic the authority to halt application of the death penalty to a convict. However, an *amparo* ruling by the Constitutional Court dated August 9, 1996, found that Decree 159 was no longer in force. It further stated that the petition for clemency did remain in force, although without any established procedure. In this regard, it determined that Decree 159 was in force from April 21, 1892 to December 22, 1944, and that it was in force again, with amendments, between December 23, 1944, and March 14, 1945, the day prior to the entry into force of the Constitution of 1945. Based on this, the Constitutional Court concluded that "the procedure established in Decree 159 of the National Legislative Assembly is not in force." It added that the request to commute the sentence is admissible against a sentence imposing the death penalty, and that it is up to the President of the Republic to hear the corresponding request, with the President's only obligation being to decide and notify the decision, there being no procedure to which the President must adhere.²⁵

51. Later, on June 1, 2000, the Congress of the Republic formally repealed Decree 159 of 1892 on finding that there was no law to "serve as a basis on which the Executive can commute a death sentence as established in Decree No. 159 of the National Legislative Assembly of the Republic, as the previous constitutions had been repealed (...)." ²⁶

52. Since that date—that is, for more than 17 years—Guatemala has neither imposed nor applied the death penalty.

2.2 Cases of Fermín Ramírez and Raxcacó Reyes v. Guatemala heard by the Inter-American Court

53. In 2005, the Inter-American Court ruled on the death penalty in Guatemala, specifically on the standard of dangerousness for imposing the death penalty for the crime of murder, as well as the lack of regulations for the petition for clemency.

54. The crime of murder is defined in Article 132 of the Penal Code, which in its applicable section states that "those convicted of murder shall be imprisoned for 20 to 30 years; however, the death penalty shall be imposed in place of the maximum prison term if the circumstances of the act, its commission, the way in which it was carried out, or its motives reveal in the perpetrator a greater and more particular dangerousness."²⁷ Decree 20-96 modified the prison term for this crime to between a 25 and 50 years.²⁸

55. In the case of Fermín Ramírez v. Guatemala, the Inter-American Court analyzed, among other issues, the aforementioned paragraph on the crime of murder and found that the invocation of dangerousness

²³ In this regard, see Decree Number 100-96 of November 28, 1996, Law Establishing the Procedures for Carrying out the Death Penalty.

²⁴ IACHR, Annual Report of the Inter-American Commission on Human Rights of 1997, OEA/Ser.L/V/II.Doc.6, February 17, 1998, para. 26-29.

²⁵ Constitutional Court, Case File 1015-96, Case Law Gazette No. 41-Single-instance *Amparos*.

²⁶ See Decree number 32-2000 published on June 1, 2000.

²⁷ See Article 132 of Decree 17-73 of the Congress of the Republic of Guatemala, Criminal Code.

²⁸ See Article 5 of Decree 20-96 of the Congress of the Republic of Guatemala.

of the perpetrator "implies the judge's appreciation with regard to the possibility that the defendant will commit criminal acts in the future, that is, it adds to the accusation for the acts committed, the prediction of future acts that will probably occur." It found that this was not compatible with the criminal legality principle declaring therefore that it violated Article 9 of the Convention, in conjunction with Article 2 of the Convention.²⁹ Accordingly, it ordered the State of Guatemala to amend the article to eliminate dangerousness as an aggravating factor for the crime of murder.³⁰

56. In this case, the Inter-American Court pointed to Article 4(6) of the American Convention regulating the right of all individuals condemned to death "to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases," indicating that with the repeal of Decree 159 of 1892 that, as noted, regulated the petition for clemency to the President of the Republic, "an organization with the power to know of and decide upon the measure of grace established in Article 4(6) of the Convention was expressly disregarded. The Court also verified that from Governmental Agreement Number 235-2000, issued on a later date, it can conclude that no State body has the power to know of and decide upon the measure of grace."³¹ It found that because under domestic law, no State body had been vested with the authority to hear and rule on petitions for clemency, the State was in violation of Article 4(6) of the Convention, in conjunction with articles 1(1) and 2 of the Convention.³²

57. The Court ordered that "before the non-existence of a legal procedure that guarantees the right to request pardon, the commutation of the sentence, or amnesty, it must decree the commutation of the punishment imposed upon all those sentenced to murder that are not able to exercise their right to pardon" and ordered the State to "adopt, within a reasonable period of time, the legislative and administrative measures necessary to establish a procedure that guarantees that every person sentenced to death has the right to request pardon or commutation of the sentence, pursuant to a regulation that determines the authority with the power to grant it, the events in which it proceeds and the corresponding procedure; in these cases the sentence must not be executed while the decision regarding the pardon or commutation of the sentence requested is pending."³³

58. In the case of Raxcacó Reyes, the Court reiterated that the repeal of Decree 159 of 1892 via Decree No. 32/2000 entailed suppression of an authority attributable to a State body to hear and rule on the right to clemency stipulated in Article 4(6) of the Convention.³⁴

2.3 Death penalty in Guatemala at the present time

59. As a result of these decisions, the Guatemalan State has neither imposed nor applied the death penalty, nor has it regulated the petition for clemency, for which reason the Criminal Chamber of the Supreme Court of Justice has been commuting the death penalty to the maximum prison term for those requesting it.³⁵

²⁹ Inter-American Court. Case of Fermín Ramírez v. Guatemala. Merits, Reparations, and Costs. Judgment of June 20, 2005. Series C No. 126, para. 94 and following.

³⁰ Inter-American Court. Case of Fermín Ramírez v. Guatemala. Merits, Reparations, and Costs. Judgment of June 20, 2005. Series C No. 126, para. 94 and following.

³¹ Inter-American Court. Case of Fermín Ramírez v. Guatemala. Merits, Reparations, and Costs. Judgment of June 20, 2005. Series C No. 126, para. 107.

³² Inter-American Court. Case of Fermín Ramírez v. Guatemala. Merits, Reparations, and Costs. Judgment of June 20, 2005. Series C No. 126, para. 110.

³³ Inter-American Court. Case of Fermín Ramírez v. Guatemala. Merits, Reparations, and Costs. Judgment of June 20, 2005. Series C No. 126.

³⁴ Inter-American Court. Case of Raxcacó Reyes v. Guatemala. Merits, Reparations, and Costs. Judgment of September 15, 2005. Series C No. 133, para. 85.

³⁵ See article from EFE, [Piden en Guatemala restituir figura de indulto, y con ella, la pena de muerte](#), March 10, 2016, El Periódico, [Comutación de la pena de muerte](#), February 12, 2016. The IACHR has also documented a series of decisions at the domestic level prior to 2000 in which domestic courts decided not to apply the death penalty because the terms of its application violated Article [continues ...]

60. The death penalty in Guatemala continues to be applicable for the following crimes: 1. Abduction or kidnapping; 2. Parricide; 3. Extrajudicial execution; 4. Murder of the President or Vice President of the Republic; 5. Crimes related to drug trafficking resulting in deaths. Some of these criminal offenses refer to the dangerousness of the perpetrator as a decisive element for application of the death penalty.

61. On February 12, 2008, the Guatemalan Congress issued a law that restored to the President the authority to spare the life or confirm capital punishment for convicted prisoners through a pardon.³⁶ However, that same month, President Alvaro Colom vetoed the law, arguing that it violated Guatemala's commitments as a party to the American Convention.³⁷ In January 2012, President Alvaro Colom again vetoed a restoration of the presidential authority to pardon people sentenced to death.³⁸

62. According to publicly available information, in 2016, initiatives were presented in the Congress of the Republic to both reactivate and abolish the death penalty. Initiative 5100, presented on July 6, 2016, seeks passage of the law to abolish the death penalty. Likewise, initiative 4941, presented on February 4, 2016, seeks to reactivate the death penalty by regulating the procedure for the application of the petition for clemency.³⁹

3. Judgment of conviction and subsequent actions

3.1 Judgment of conviction

63. On May 14, 1999, the Sixth Court for Criminal Sentencing, Drug-Related Activities and Crimes against the Environment of Guatemala issued a judgment of conviction against Mr. Ruiz Fuentes and other individuals for the crime of abduction or kidnapping, as regulated in Article 201 of the Criminal Code and sentenced them to death. The Court found that:

(...) inasmuch as the actual participation of the defendants as immediate perpetrators in the crime that is the subject of the proceedings is proven BY MAJORITY OF VOTES, the Court sentences them to the punishment that is set forth in the operative portion of this ruling, inasmuch as it finds that it is applicable and does not violate the provisions set forth in the American Convention on Human Rights (Pact of San Jose) because it is not being imposed for a crime that was not established prior to the entry in force of the related international convention, because the crime of kidnapping was previously punishable by the death penalty (principle of legality with regard to the punishment), and as a consequence, there is no conflict with Article 4 of the aforementioned convention, because no person has the right to deprive another person of liberty and to negotiate the release without taking into account a minimum of respect for the Human Rights of the victim, the mere kidnapping and

[... continuation]

4(2) of the American Convention. In this regard, in its 1997 annual report, the IACHR stated: "The Commission referred in its last report to the noteworthy judgment of the Ninth Chamber of the Court of Appeals of January 30, 1997, commuting three death sentences to noncommutable sentences of 50 years on the basis of the requirements of domestic law including the State's obligations pursuant to Article 4 of the American Convention. The Commission has received information that the Court of First Criminal Instance, Narcoactivity and Crimes against the Environment of the Department of Santa Rosa, Cuilapa issued a similar decision on May 8, 1997, in the case of Guillermo López Contreras, having determined that, under the terms of the applicable legal regime, the court could not legally impose the death penalty for a crime for which that punishment was not prescribed at the time of Convention ratification. The Commission recognizes and values such decisions which properly respect and reflect the international human rights obligations which the State has undertaken." See IACHR, Annual Report of the Inter-American Commission on Human Rights of 1997, Guatemala, OEA/Ser.L/V/II.98, Doc.6, February 17, 1998, para. 27.

³⁶ See Congress of the Republic of Guatemala, Decree Number 6-2008, Regulatory Law on the Commutation of the Sentence of Those Condemned to Death.

³⁷ Article published at elmundo.es, Colom veta la ley que restituyó la pena de muerte en Guatemala, March 15, 2008; News article published at BBCMundo.com, Colom vetó pena de muerte, March 15, 2008.

³⁸ News article published at laprensa.com.ni, Colom veta ley con que reactivarían pena de muerte, November 5, 2010.

³⁹ Bills presented before the Congress of the Republic of Guatemala.

deprivation of freedom of movement in the way in which the crime under prosecution occurred, inflicts irreparable harm on the victim, considering as well that the kidnapped person was a minor, whereby it displays an overt scorn for the innocence and purity of childhood, as well as defiance and scoffing at society and the authorities in charge of citizen security, and therefore under those guidelines the punishment shall be imposed (...).⁴⁰

64. Article 201 of the Criminal Code, as applied to the alleged victim, established that:

Principal perpetrators and masterminds of the crime of abduction or kidnapping of one or more persons for the purpose of securing ransom, exchange of persons or making a decision against the will of the person kidnapped or for any other similar or equivalent purpose, shall be punished with the death penalty, and in the event it may not be imposed, they shall be punished with a prison term of twenty-five to fifty years. In this latter instance, no mitigating circumstances shall be assessed. Accomplices before and after the fact shall be punished with a prison term of twenty to forty years.

65. Based on the wording of this article, the Court did not examine if any attenuating circumstances applied. It did not make any assessment either as to whether any aggravating circumstances applied. The exceptions to imposition of the death penalty to which the legal definition of the offense refer, are set forth in the Political Constitution of the Republic of Guatemala, and were described in the contextual section of the instant report.

66. The article referenced above, which was applied to Mr. Ruiz Fuentes, came into force on October 21, 1996. Nonetheless, Article 201 of the Criminal Code in effect at the time of ratification of the American Convention,⁴¹ provides for the death penalty only in cases of kidnapping followed by death, as follows:

The abduction or kidnapping of a person for the purpose of securing ransom, exchange for third persons or another illicit purpose of equivalent or analogous significance, shall be punished with a prison term of eight to fifteen years. The death penalty shall be imposed, when because of or on the occasion of the abduction or kidnapping, the kidnapped person dies.

67. In the judgment of conviction, Judge Silvia Morales issued a reasoned opinion explaining that the application of the death penalty constituted an expansion that runs counter to the American Convention.⁴²

3.2 Special appeal for review of judgment

68. The alleged victim filed a special appeal for reconsideration of judgment with the Sixth Court for Criminal Sentencing, Drug-Related Activities and Crimes against the Environment.

69. He contended that the Sentencing Court adjudged as proven a set of facts other than the facts set forth in the formal charging document, thus infringing his right of defense.⁴³ The particular fact which, in

⁴⁰ Annex 8. Judgment of conviction issued by the Sixth Court for Criminal Sentencing, Drug-related Activities and Crimes against the Environment of Guatemala of May 14, 1999.

⁴¹ Guatemala ratified the American Convention on May 25, 1978.

⁴² Annex 9. Reasoned opinion of Judge Silvia Roxana Morales Alvarado de Gordillo in criminal proceeding 4-98. Judgment of conviction issued by the Sixth Court of Criminal Sentencing, Drug-Related Activities and Crimes against the Environment of Guatemala of May 14, 1999.

⁴³ He also claimed that the following fact identified with roman numeral III of the judgment was not included in the charging document: "a) Subsequently they started up the pick-up that was waiting for them whose driver was defendant Hugo Humberto Ruiz Fuentes, heading in an unknown direction later transferring the minor to the cabin placing a cap over his face. Annex 10. Judgment of the Fourth Chamber of the Court of Appeals of September 13, 1999.

his view was essential to establish the commission of the crime, is the following: “when they learned the family information, they called Mr. OSCAR DE LEON GAMBOA, the father of the minor, on the telephone, who was told that he knew he has money, and that in exchange for the release of his son they demanded the sum of one million quetzals, with such calls being repeated several times during the captivity of the minor.”⁴⁴

70. He also claimed that he was deprived of his right to offer and introduce evidence during the trial because at said phase the Court summoned the parties for evidentiary hearings over the course of eight days and “on this opportunity, I appeared in court to introduce the evidence for the written arguments brief (memorial) dated March 29 of 1999; however, because of an omission by then Defense Attorney, Edgar Alberto Argueta Moreno, who failed to sign and seal the written brief, the sentencing court did not admit the evidence and, consequently, I was precluded from offering any evidence in the proceedings.”⁴⁵

71. He further argued that the Court improperly applied Article 201 of the Criminal Code by disregarding Article 46 of the Constitution⁴⁶ and Article 4 of the Convention, since at the time of its ratification the death penalty could not be imposed for the crime of kidnapping, in instances where the victim did not die.

72. On September 13, 1999, the Fourth Chamber of the Court of Appeals denied the special appeal for reconsideration of judgment filed by the alleged victim and other defendants.

73. As for the allegation that the Court regarded as proven different facts than those appearing in the formal charging document, the Fourth Chamber held that “it is logical to prove that there is consistency between the facts of the charging document and those that the court found to be proven, and being that this Chamber in its ruling may not discuss the evidence or the facts that are declared proven pursuant to the rules of free and reasoned judgment the decision is correct. Therefore it is concluded that the facts adjudged as proven by the court are true inasmuch as they reflect the form and mode of execution of the crime, who is liable, the time and day of the perpetration thereof, as well as who was the victim of the Abduction or Kidnapping (...)” With respect to the alleged violation of the right to defense on the grounds of being precluded from introducing evidence during the evidentiary hearings, the Chamber held that “the appellant’s right of defense was not violated at any time (...) and if the proposed evidence was rejected based on a technicality of form in the way the attorney offered the evidence for submission, nonetheless, the appellant could have could have filed objections during the respective case proceedings wherein there was no claim of non-compliance.” Regarding the allegation about Article 4.2 of the Convention, it noted that it has held repeatedly that “there is no violation of law in applying the death penalty to perpetrators of the crime of Abduction or Kidnapping, when the victim does not die, inasmuch as Article 201 of Decree 17-73 previously provided for said punishment from before the time the aforementioned convention came into effect, and since it [the convention] only limits applying it [the death penalty] to new crimes, the case of Abduction or Kidnapping does not fall under this circumstance (...)”⁴⁷

3.3 Appeal of judgment to the Supreme Court of Justice (Cassation)

74. On October 12, 1999, the alleged victim filed a cassation appeal with the Supreme Court of Justice against the decision of the Fourth Chamber of Appeals and submitted the grounds for the appeal on November 4, 1999, alleging flaws of procedure and substance in the judgment of conviction.

⁴⁴ Annex 10. Judgment of the Fourth Chamber of the Court of Appeals of September 13, 1999.

⁴⁵ Annex 10. Judgment of the Fourth Chamber of the Court of Appeals of September 13, 1999.

⁴⁶ Said article reads: “Precedence of International Law. The general principle is established that in the area of human rights, treaties and conventions accepted and ratified by Guatemala, take precedence over domestic law.” Political Constitution of the Republic of Guatemala.

⁴⁷ Annex 10. Judgment of the Fourth Chamber of the Court of Appeals of September 13, 1999.

75. He contended that the Fourth Chamber of the Court of Appeals did not rule on his claim that in the trial court judgment, certain facts, which were different from the facts appearing in the formal charging document, were adjudged as proven, and that this panel of judges did nothing but note that they are unable to discuss evidence or facts, which are declared as proven. Consequently, he claimed his right to defense was violated because Article 388 of the Code of Criminal Procedure stipulates: “the judgment may not adjudge as proven any facts or other circumstances other than those described in the formal charges and in the court order instituting criminal proceedings (...)” It was reiterated that the alleged victim’s right to introduce evidence was impeded during the evidentiary hearings, adding that “he was left without the ability to offer and introduce evidence on behalf of defendant Hugo Humberto Ruiz Fuentes and, in any case, the court should have observed Article 103 of the Code of Criminal Procedure, declaring abandonment of defense and appointing a public defender, as well as setting a date for the respective hearing to be able to offer evidence and produce it at the time of arguments.” He also reiterated the argument of expanding the application of the death penalty in violation of the American Convention; notwithstanding, at the time of ratification of said instrument, the death penalty was only applicable to kidnappings followed by the death of the victim.⁴⁸

76. The Criminal Chamber of the Supreme Court of Justice joined the appeals filed by the other convicted persons with the appeal of the alleged victim and on July 20, 2000, denied them all. As for adjudging as proven facts other than those raised in the formal charges, the Chamber found that the argument does not fit into the secondary reasoning (‘sub-reason’) put forward by him and, therefore, there was a “flaw in his explanation.” With respect to the allegation that the Chamber did not rule on the essential point that the alleged victim was unable to introduce evidence during the proceedings, the Supreme Court found that “the existence of the flaw claimed [by him] is not true (...) inasmuch as the Fourth Chamber of the Court of Appeals expressly ruled and explained its decision (...) and even though, the special appeal was not decided in a way favorable to the interests of the appellants, this does not constitute an error (...)” Lastly, regarding the imposition of the death penalty for the crime of abduction or kidnapping when the victim did not die, the Chamber noted: “the death penalty with the crimes of abduction or kidnapping, was applicable prior to the entry in force of the aforementioned Convention.”⁴⁹

3.4 *Amparo* relief

77. On August 29, 2000, the alleged victim filed a petition for constitutional relief via *amparo* with the Court of Constitutionality against the decision of the Criminal Chamber of the Supreme Court, reiterating the reasons why he believes the death penalty is not applicable in his case.⁵⁰

78. On July 4, 2001, the Court of Constitutionality denied the petition and ruled that the expansion of the death penalty under the crime of kidnapping to circumstances that were not covered when the American Convention came into force in Guatemala does not violate said instrument because the same crime was already punishable by said penalty, which was expanded in keeping with the criterion of liable participation in a crime (*autoría*). The Court specifically held that:

(...) what the legislator has done in the above-cited reforms, is to extend the application of the penalty –in this case the death penalty– in keeping with the criterion of liable participation of the persons who commit the crime of kidnapping, extension that is not prohibited by Article 4 numeral 2 of the Convention (...) this Court finds that application of Article 201 of the Criminal Code by the challenged courts in the case of the *amparo*-seeking

⁴⁸ Annex 11. Appeal filed with the Supreme Court of Justice (Cassation) by Hugo Humberto Ruiz Fuentes and Jorge Mario Murga Rodríguez on November 4, 1999.

⁴⁹ Annex 12. Judgment of the Criminal Chamber of the Supreme Court of Justice denying the cassation appeals filed on July 20, 2000.

⁵⁰ Annex 13. *Amparo* relief sought by Hugo Humberto Ruiz Fuentes and Jorge Mario Murga Rodríguez on August 29, 2000.

party, does not violate Article 46 of the Constitution or Article 4.2 of the Convention, even in the case of abduction or kidnapping not followed by the death of the victim.”⁵¹

3.5 Motion for review of judgment (*Recurso de revisión*)

79. On December 16, 2002, the alleged victim filed a motion for review of the final judgment sentencing him to the death penalty, arguing that said penalty was imposed on him even though the victim did not die and that his dangerousness was established on the basis of presumptions. He also contended that the application of the death penalty violated the American Convention, which establishes that said penalty shall not be extended to conducts for which it was not applicable at the time of the entry into force of said treaty.⁵²

80. On December 1, 2003, the Criminal Chamber of the Supreme Court of Justice denied the motion noting that the arguments “do not constitute new evidence that is suitable to provide a basis for a less serious sentence.”⁵³

3.6 Petition for pardon

81. On December 16, 2003, the alleged victim filed a petition for pardon with the Ministry of the Interior to commute the punishment to the next lowest one of 50 years prison term.⁵⁴ The available information shows that as of July 2004, the petition had not been ruled on.⁵⁵ The IACHR has no further information.

4. Death of the alleged victim in the context of Plan Gavilán

4.1 Plan Gavilán

82. On October 22, 2005, there was an escape from the maximum security jail known as “The Little Hell” (*El Infiernito*) by nineteen persons deprived of liberty, who dug an approximately 120 meter long tunnel from the “A” sector to the electrified security fence on the perimeter of the facilities. According to the State, members of the penitentiary system aided and abetted the inmates.⁵⁶

83. On that same date, the State launched “Operation Gavilán” in order to “carry out a search and recapture these dangerous criminals.” Said plan involved eight search teams, was led by the Chief of the National Civilian Police, Víctor Hugo Soto Diéguez, and 16 members of the police participated. As for the use of force, a copy of the actual plan indicates that for the use of firearms, the provisions of law set forth in Article 24 of the Criminal Code in effect at the time were to be taken into account, with grounds for justification [of use of firearms] being: legitimate defense, state of need and legitimate exercise of a right.⁵⁷

⁵¹ Annex 14. Judgment of the Court of Constitutionality denying the *amparo* relief sought by Hugo Humberto Ruiz Fuentes and Jorge Mario Murga Rodríguez, July 4, 2001.

⁵² Annex 15. Motion for review of judgment filed by Hugo Humberto Ruiz Fuentes with the Criminal Chamber of the Supreme Court of Justice on December 16, 2000.

⁵³ Annex 16. Decision of the Criminal Chamber of the Supreme Court of Justice denying the motion for review on December 1, 2003.

⁵⁴ Annex 17. Petition for pardon [clemency] filed by the alleged victim with the Ministry of the Interior on December 16, 2003.

⁵⁵ IA Court of HR. Case of Raxcacó et al, decision of the Court of August 30, 2004. Request for provisional measures submitted to the Inter-American Commission on Human Rights with respect to Guatemala.

⁵⁶ Annex 18. Internal Plan of Action No. 002-2005 “Operation Gavilán”. Annex to State’s submission of observations in the case of Hugo Humberto Ruiz Fuentes, August 18, 2009.

⁵⁷ Annex 18. Internal plan of action. No. 002-2005 “Operation Gavilán.” Annex to State’s submission of observations in the case of Hugo Humberto Ruiz Fuentes of August 18, 2009.

84. As reported by the State, during said operation, nine fugitives were recaptured,⁵⁸ while the recapture of three fugitives was pending and “due to circumstances that arose during the operations 7 fugitives died.”⁵⁹ As noted by the State, Hugo Humberto Ruiz Fuentes was one of the those who died, as explained in the section below.

4.2 Death of the alleged victim following his escape from the jail and the respective investigations

85. According to information from the parties, Mr. Ruiz Fuentes died on November 14, 2005, on 0 Street 5th Avenue of the neighborhood Colonia Monja Blanca de Barberena Santa Rosa, in the context of “Plan Gavilán.”

86. As a result of the death of the alleged victim, an investigation was opened which produced several pieces of evidence to determine the cause and circumstances of his death, which are laid out below.

87. Pursuant to the report on the autopsy performed on the body, the cause of death was “cerebral and pulmonary perforation by piercing wounds from firearm projectiles.”⁶⁰

88. In said document, it attests that the alleged victim “presents a HPAF firearm projectile wound with entry orifice in the right eye with a tattooed area around it. The orifice is atypical and pierces the upper eyelid, eye socket, right hemisphere and with the exit orifice in the occipital. TRAJECTORY: Front-back. There is intracranial hemorrhaging. Cerebellum looks pale. Additionally, in the thorax he presents “HPAF with entry orifice of 0.8 cm diameter at the level of the third intercostal space outside of the right medial clavicular line, which pierces: skin, muscle, right lung and exit orifice outside of right scapula. TRAJECTORY: Front-Back. There is hemothorax.”⁶¹

89. The police report of November 14, 2005, indicates that the body was found at 0 Avenue and 5th Street of Colonia Monja Blanca, zone 2 of Barberena, Santa Rosa. In this report, it is noted that “the man deceased today is holding in the right hand a pistol-type firearm, 9 millimeter caliber, Jericho brand” (...), “at the scene of the crime 20 shells of unknown caliber were located and a destroyed bullet unknown caliber, in one of the red color doors of the domicile located at the site of the incident, five firearm projectile perforations of unknown caliber were visible. Additionally, at the scene of the crime, 12 members of the Anti-Kidnapping Commando of the National Civilian Police (PNC), commanded by PNC Chief: VICTOR HUGO SOTO DIAZ, who held the area of the scene of the crime under his custody, the time being 22:30 hours (...).”⁶²

90. Likewise, on November 15, 2005, the medical forensics department of the Judicial Agency reported on the results of the autopsy of the alleged victim attesting that the cause of death was “cerebral and pulmonary perforation by firearm projectile piercing wounds” and he added in observations “no evidence.”⁶³

91. According to a expert forensic doctor’s report submitted by Guillermo Austreberto Carranza Izquierdo on June 3, 2008, relating to the processing of the scene of the crime, the scene was not properly processed and underwent deliberate alterations. In said expert report, Doctor Carranza concluded that: 1. The scene of the crime [that was] processed for the death of Hugo Humberto Ruiz Fuentes was deliberately

⁵⁸ State’s submission of observations in the case of Hugo Humberto Ruiz Fuentes of August 18, 2009.

⁵⁹ State’s submission of observations in the case of Hugo Humberto Ruiz Fuentes of July 27, 2009.

⁶⁰ Annex 19. Report of autopsy performed by the forensic medical department of the Judicial Agency of Cuilapa, Santa Rosa of November 15, 2005. Annex 1 to petitioners’ submission of July 12, 2007.

⁶¹ Annex 19. Report of autopsy performed by the forensic medical department of the Judicial Agency of Cuilapa, Santa Rosa of November 15, 2005. Annex 1 to petitioners’ submission of July 12, 2007.

⁶² Annex 20. Police report of November 14, 2005. Annex 3 to petitioners’ submission of July 12, 2007.

⁶³ Annex 21. Report of the Medical Forensics Department of the Judicial Agency of Cuilapa, Santa Rosa, Edgar Ricardo Arriola Barrios, of November 15, 2005.

altered by government authorities; 2. Because of the blood stain on the right sleeve of the sweater of the alleged victim, it can be concluded that the original position of the body was face down or ventral cubital, with his face supported on the right forearm; 3. The position of the victim to victimizer is standing face to face, aiming the barrel of the firearm at a 90 degree angle, at a distance of 15 centimeters from the victim, which is the reason why the victim blinked as a reflex (...); 4. Because of the wound received on the face the alleged victim lost consciousness and collapsed to the floor, and this is inconsistent with being able to keep holding the firearm in his right hand; 5. There was evidence that was ignored, including not packaging the clothes of the deceased, and not performing an inspection on him to establish traces of human blood.⁶⁴

4.3 Hypothesis about the perpetrators of the killing

92. The State took conflicting positions in processing the case before the Inter-American system as well as in the domestic case regarding the death of the alleged victim. On the one hand, it attributed the death of the alleged victim to unknown individuals and, on the other hand, it claimed that the alleged victim died in a confrontation with police agents.

93. Regarding the first hypothesis, as per the testimony of Director of the National Civilian Police Erwin Sperisen on the day of the incidents,

The National Civilian Police received a call about an incident that took place on 0 street and 5th Avenue, Colonia Monja Blanca, Barberena, Santa Rosa, where a person died. When the police arrived at the location, and in addition to a few investigators of the SIC (Criminal Investigation Service) because it was a homicide, when they arrived they noticed that (...) it was Hugo Humberto Ruiz Fuentes, who was one of the fugitives from the little hell [jail]. This last time was his third opportunity that he escaped. His first opportunity was in 2001 of the escape that there was and he was recaptured, he was involved in the attempt to escape of 2004 and it was later, he now escaped in 2005 and now then he died in this incident (...), We want to tell the population that we are going to be pursuing [them], there's talk that there is possibly another person but it still has not really been corroborated that there are other fugitives also another one possibly died in the area of Jutiapa (...) According to witness reports of who he was with, there were other persons, suspicious ones, hey they were with him, it seems that they were trying to gather at a location, at a restaurant, at a fast food chain, that is located in Barberena, and, apparently, that's where several arguments broke out and in the end these persons killed this individual (sic).⁶⁵

94. On February 21, 2006, the State asserted to the IACHR that "some persons who were moving through the location noticed that Mr. Ruiz Fuentes was walking along the street when several individuals carrying firearms, and without uttering a word, fired several shots at him and killed him, and then fled the scene."⁶⁶

95. Similarly, Juan José Marroquín Solís, of the Office of Criminal Investigation of the National Civilian Police of Cuilapa, Santa Rosa, stated that "the persons responsible for said act could not be identified, it was only established that they were unknown persons who were pursuing the person who died today and who killed him. Personnel of the Anti-Kidnapping Commando of the Police arrived on the scene, in order to establish the identity of the body, but it was not established whether they had any involvement in the incident."⁶⁷

⁶⁴ Annex 22. Expert report of Forensic Doctor Guillermo Austreberto Carranza Izquierdo.

⁶⁵ Annex 23. Radio and Television news reports of the recapture of the fugitives from the little hell jail, October 2005. Special News Report of Tele Diario 13.

⁶⁶ State's submission of observations of February 21, 2006.

⁶⁷ Annex 24. Statement of Juan José Marroquín Solís before the District Office of the Prosecutor of the Ministry of Public Prosecution, Cuilapa, Santa Rosa, on March 21, 2006.

96. Likewise, according to the testimony of Meregildo Cermeño Cabrera, National Civilian Police agent, when he arrived at the scene of the crime “I observe that there were several persons dressed in civilian attire, with facemasks, with firearms, long and short barrel firearms, those who were commanded by police chief Victor Hugo Soto Díaz; at the site I also observe the body of a person of the male sex; lying on the ground, with wounds possibly from a firearm; as information at the scene of the crime it was mentioned that the deceased man had had an exchange of shots with unknown individuals (...).”⁶⁸

97. Additionally, in a report of the District Attorney’s Office of the Ministry of Public Prosecution, it is noted that the prosecutor’s office believes “that the cause of HUGO HUMBERTO RUIZ FUENTES being violently killed was because this person was engaged in acts of common crime.” It is further noted that the Office of the District Attorney believes that “because a firearm was found in the right hand of the deceased (...) and that said weapon fired 14 of the shells found at the scene of the crime, and one projectile and, according to investigations conducted at the scene of the crime, by personnel of the National Civilian Police wherein it was established that, based on public rumors, the deceased was persecuted by several unknown individuals, leads to the assumption that Mr. HUGO HUMBERTO RUIZ FUENTES did shoot the firearm, to try to avoid his death.”⁶⁹

98. According to information provided by the State to the IACHR on July 24, 2007, it requested information from the Ministry of Public Prosecution about the investigation, which indicated that “the hypothesis that is being followed regarding the violent death of Mr. HUGO HUMBERTO RUIZ FUENTES, is related to the activity he was engaged in and because of the sensitivity of the investigation we apologize for not being able to provide further information.”⁷⁰

99. Additionally, with regard to the second hypothesis, based on other media sources, the death of the alleged victim was due to a confrontation that he engaged in with the Elite Commando that was conducting the search for the fugitives from “The Little Hell” jail.⁷¹ According to a newspaper, chief of the Criminal Investigation Service (SIC) Victor Hugo Soto asserted with regard to the death of the alleged victim that “when the detectives proceeded to ask him to identify himself, he pulled out a pistol and started to shoot at them. In the midst of the crossfire, the fugitive fell in the middle of the street.”⁷²

100. According to another newspaper report, then Vice Minister of the Interior Enrique Godoy, announced that “fugitive Hugo Humberto Ruiz Fuentes, was shot dead last night by agents of Plan Gavilán of the Criminal Investigation Service (SIC) after a chase that took place in Barberena, Santa Rosa.”⁷³

101. Furthermore, in a submission of November 22, 2005, filed with the Inter-American Court in the context of the processing of the provisional measures granted by said body, the State reported that “during his capture, Mr. Hugo Humberto Ruiz Fuentes resisted arrest, by drawing his weapon and, therefore, the agents of the Criminal Investigation Service (SIC) fired and killed him.”⁷⁴ In a submission of July 27, 2009 to the IACHR, the State claimed that Mr. Ruiz Fuentes was one of the fugitives who died during Plan Gavilán.⁷⁵

⁶⁸ Annex 25. Statement of Meregildo Cermeño Cabrera given to Office of the Public Prosecutor of the Ministry of Public Prosecution on November 7, 2007.

⁶⁹ Annex 26. District Prosecutor’s Report addressed to the Coordinator of the Technical Secretariat of the Ministry of Public Prosecution of June 8, 2007.

⁷⁰ State’s submission of observations of July 24, 2007.

⁷¹ Annex 27. Radio and Television news reports on the recapture of the fugitives from ‘little hell’ jail, October 2005. Special news report of Noti 7.

⁷² Newspaper clipping published in Nuestro Diario. Prófugo abatido en enfrentamiento [‘Fugitive gunned down in shoot out’]. November 15, 2005.

⁷³ Press clipping published in Diario “El Periódico”, story of November 15, 2005, pg. 6.

⁷⁴ IA Court of HR, Ruling of the Inter-American Court of Human Rights of July 4, 2006, Raxcacó Reyes et al, Para.20.

⁷⁵ State’s submission of observations on the case of Hugo Humberto Ruiz Fuentes of July 27, 2009.

4.4 Steps taken in the investigation

102. The information about the investigation into the death of Hugo Humberto Ruiz Fuentes appearing in the case file is described hereunder. The State reported that several steps were taken in the context of the investigation such as the taking of testimonies and reports from the Crime Scene Search Specialist Unit, the Ballistics Section of the Scientific Technical Department, among other ones.⁷⁶

103. Additionally, in a report of October 22, 2007, of the Ministry of Public Prosecution, the investigative steps are noted. In particular, mention is made that on September 5 and 6, 2007, the Chiefs of the Anti-Kidnapping and Homicide Units of the Directorate of Criminal Investigation of the National Civilian Police were contacted, and they claimed to not be familiar with the details of “Plan Gavilán.” Likewise, an attempt was made to interview Commissioner General Irrain Corado Zuñiga, Assistant Director General of the DINC, in order for him to provide information about Plan Gavilán; however, the attempts were fruitless, “despite having attempted to do so on several occasions.”⁷⁷ It was also noted that then Director General of the DINC Victor Hugo Soto Diéguez was summoned to provide a statement on March 21, 2006 and April 26, 2006, but he did not show up to the appointments.⁷⁸

104. Moreover, based on the results of the investigation, according to documentation and records made at the scene of the crime, the alleged victim was holding in his hand “a Jericho brand, nine millimeter caliber, pistol-type firearm, on one side of the barrel it read, nine hundred and forty-one F (941F) Israel Militari Industrie (IMI), with the registry number ground down, 15 round magazine, which was empty.”⁷⁹ The Commission notes that the Ballistics Section of the Ministry of Public Prosecution conducted an examination of said firearm and indicated that “the Fry test was performed, enabling successful retrieval of identification number 97321527.”⁸⁰ It appears on record in the case file that said weapon is the property of the Ministry of the Interior and was assigned to officer Evin Rolando Choto Casimiro and, consequently, an administrative investigation proceeding was opened into his liability for the loss of the weapon bearing registration number 97321527.⁸¹ Moreover, said firearm was not reported as stolen.⁸²

105. According to information provided by the National Civilian Police Officer Third Class, on October 31, 2005, Officer Evin Rolando Choto Casimiro attended an environmental training course in the Metropolitan Municipality, however, after said training was over he no longer showed up to work and “has been absent for seventy-two (72) hours, without communicating through any means with any command officer of this police station. He is carrying on him the standard issue equipment consisting of: One pistol-type, nine millimeter caliber, Jericho brand firearm, registration number 97321527 (...).”⁸³

106. The Commission does not have any information on the results of said investigation. The Commission does not have any information either about additional steps taken in the investigation into the death of Mr. Ruiz Fuentes.

⁷⁶ State’s submission of observations of July 24, 2007.

⁷⁷ Annex 28. Report of the Expert on the criminal investigations of the Ministry of Public Prosecution of October 22, 2007.

⁷⁸ Annex 29. Report of the Prosecuting Attorney of the Ministry of Public Prosecution of October 22, 2007.

⁷⁹ Annex 30. Record issued by Deputy Prosecutor of the Ministry of Public Prosecution of Santa Rosa, Félix Audel Gomez Carias, November 14, 2005.

⁸⁰ Annex 31. Report of the Ballistics Section of the Ministry of Public Prosecution of March 28, 2006.

⁸¹ Annex 32. Decision of the Office of the Assistant Director General for Finances and Logistics of the National Civilian Police.

⁸² Annex 33. Official Letter from the Ministry of National Defense of June 28, 2007.

⁸³ Annex 34. Report number 80-2005 issued at police station number 11 of the National Civilian Police on November 7, 2005.

4.5 Other investigations of the consequences of “Plan Gavilán”

107. The Commission takes note that based on publically available information, the Guatemalan State conducted certain criminal investigations to determine liability stemming from the consequences of the operation and the death of some of the persons deprived of liberty, who escaped from “The Little Hell” prison facilities. In particular, according to publically available information, on August 8, 2013, First Court of Major Risk B issued a judgment of conviction against Víctor Manuel Ramos Molina and Axel Arnaldo Martínez Arreaza for the extrajudicial execution of Edwin Estuardo Santacruz, one of the escapees from “The Little Hell” jail.⁸⁴ On that same date, it sentenced Víctor Hugo Soto Diéguez, former chief of Criminal Investigation of the National Civilian Police to 22 years prison term for the extrajudicial execution of several convicts in the prisons of Pavón and The Little Hell, which he carried out from 2005 to 2006.⁸⁵

108. According to information from the International Commission against Impunity in Guatemala (CICIG), Major Risk Tribunal B mentioned the deaths of the fugitives from justice of “The Little Hell” jail and asserted that “the involvement that there was by the authorities in the operations carried out for the extrajudicial executions of the fugitives was evident” and further noted that “the investigations determined that a parallel structure within the State was created, which had the power to carry out extrajudicial executions on whomever they regarded as a ‘blight’ and “enemies of society.” Said Tribunal also mentioned that “this group used all of the power and the machinery of the State to carry out criminal actions, and at the same time achieve impunity for their acts knowing full well that their acts were unlawful.”⁸⁶ The former Minister of the Interior at the time the crimes took place is also undergoing a criminal proceeding in Spain, for the aforementioned acts.⁸⁷

109. The Commission notes that, similarly, the UN Special Rapporteur on extrajudicial, summary and arbitrary executions, a propos of his visit to Guatemala from August 21 to 25, 2006, decried the existence of groups in the National Civilian Police force who engaged in social cleansing. In his own words: “social cleansing is something more than the actions of a few corrupt agents” and added that “groups dedicated to social cleansing are still operating within the National Civilian Police.”⁸⁸ He also noted that “the incidents of social cleansing are not effectively investigated, so official statistics do not reflect the prevalence thereof.”⁸⁹

IV. LEGAL ANALYSIS

110. Taking into account the parties’ arguments and the proven facts, the Commission shall perform the legal analysis thereof as follows: A. Right to life, fair trial and judicial protection in the context of the case that culminated in the imposition of the death penalty and the failure of the law to provide for any procedure to entertain a petition for pardon; B. Right to humane treatment with respect to the phenomenon of “death row” and relevant provisions of the IACPPT; C. Rights to humane treatment, a fair trial and judicial protection with respect to the detention and alleged torture and relevant provisions of the IACPPT; and D. Rights to life, a fair trial and judicial protection with respect to the death.

⁸⁴ CICIG, Press Release 041 Tribunal condena a responsables de ejecuciones extrajudiciales [‘Court convicts those responsible for extrajudicial executions’], August 8, 2013.

⁸⁵ CICIG, Press Release 041 Tribunal condena a responsables de ejecuciones extrajudiciales, [‘Court convicts those responsible for extrajudicial executions’], August 8, 2013; Also see Sentencias condenatorias en procesos que apoya la CICIG [‘Judgments of conviction in cases supported by the CICIG’]

⁸⁶ CICIG, Press Release 041 Tribunal condena a responsables de ejecuciones extrajudiciales [‘Court convicts those responsible for extrajudicial executions’], August 8, 2013.

⁸⁷ See news item published in Prensa Libre, Fiscalía insiste en pedir 160 años de cárcel para Carlos Vielman, [‘Office of Prosecutor presses for 160 years in jail for Carlos Vielman’], February 21, 2017.

⁸⁸ Report of Philip Alston, Special Rapporteur on extrajudicial, summary and arbitrary executions. UN Mission to Guatemala from August 21 to 25, 2006. A/HRC/4/20/Add.2, February 19, 2007.

⁸⁹ Report of Philip Alston, Special Rapporteur on extrajudicial, summary and arbitrary executions. UN Mission to Guatemala from August 21 to 25, 2006. A/HRC/4/20/Add.2, February 19, 2007.

A. Rights to life,⁹⁰ a fair trial⁹¹ and judicial protection⁹² in the context of the case that culminated in the imposition of the death penalty and the non-existence of a petition for pardon

1. General considerations on the standard of analysis in death penalty cases

111. The Inter-American Commission deems it fitting to underscore its prior rulings with regard to the rigorous scrutiny to be used in cases involving application of the death penalty. The right to life is widely recognized as the supreme right of the human being and as the *conditio sine qua non* to the enjoyment of all other rights.⁹³

112. Therefore, the IACHR considers that it has an enhanced obligation to ensure that any deprivation of life, which may occur through the application of the death penalty strictly complies with the requirements of the applicable Inter-American human rights instruments, including the American Declaration.⁹⁴ This rigorous scrutiny is consistent with the restrictive approach adopted by other international human rights bodies when examining cases involving the death penalty⁹⁵ and the Inter-

⁹⁰ Article 4 of the American Convention establishes in the relevant portions:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

(...)

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

⁹¹ Article 8 of the American Convention establishes in the relevant portions, the following:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: (...) d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; (...) f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; (...) h) the right to appeal the judgment to a higher court.

⁹² Article 25 of the American Convention establishes in the relevant portions, the following: 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

⁹³ IACHR; Report No. 76/16, Case 12.254. Merits. Victor Saldaño. United States. December 10, 2016, para. 169.

⁹⁴ See, in this regard, IACHR, The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011.

⁹⁵ See, for example, IA Court of HR, Advisory Opinion OC-16/99 (October 1, 1999) "The Right to Information on Consular Assistance in the Framework of Guarantees of Due Process of Law," para. 136 (determination that "because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result."); UN-HRC, Baboheram-Adhin et al. v. Surinam, Communications No. 148-154/1983, approved on April 4, 1985, para. 14.3 (where it is noted that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the State); Report of United Nations Special Rapporteur on Extrajudicial, Executions, Bacre Waly Ndiaye, submitted pursuant to the Resolution of the Inter-American Commission on Human Rights 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, UN Doc.E/CN.4/1995/61 (December 14, 1994) (hereinafter "Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trial to each and every case that needs to be ensured and, in

[continues ...]

American Commission has echoed this approach and applied it in the death penalty cases that have come before it in the past.⁹⁶

113. As the Commission has explained, this standard of review is the necessary consequence of the specific penalty at issue and the right to a fair trial and all attendant due process guarantees.⁹⁷ In Commission's own words:

Due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.⁹⁸

114. The Inter-American Commission, therefore, will examine the petitioners' allegations in the instant case with a rigorous degree of scrutiny so as to ensure, in particular, that the rights to life, a fair trial and judicial protection, among others set forth in the American Convention, have been respected by the State.

2. Analysis as to whether in the case that culminated with the imposition of the death penalty the rights to a fair trial and judicial protection were respected

2.1 General Considerations

115. In keeping with the spirit and letter of the preceding section, the IACHR reiterates the fundamental importance of ensuring the fullest and strictest compliance with the due process guarantees when prosecuting persons for crimes punishable by the death penalty. As the Commission has noted in the past, "Those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees"⁹⁹ in order to ensure that any and all deprivation of life through this punishment does not transgress any obligation enshrined in applicable instruments of the Inter-American human rights system.¹⁰⁰

116. As for the right to a defense and, particularly to a technical defense, the Inter-American Court has held that charges may be confronted and disproved by the accused through his own acts, including the statement he provides about the facts he is charged with, and by the legal representation exercised by a legal professional, who advises the accused on his rights and duties and who also exercises, *inter alia*, a critical control over lawfulness in the production of evidence.¹⁰¹ The Court has also held that the right to have adequate time and the means for the preparation of the defense, enshrined in Article 8.2 c) of the ACHR, includes allowing the accused to have access to the record of the case and to the evidence gathered against

[... continuation]

case of indications to the contrary, to be verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violations of the right to life).

⁹⁶ IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Félix Rocha Díaz, United States, March 23, 2015, paragraph 54; Report No. 44/14, Case 12.873, Merits (publication), Edgar Tamayo Arias, United States, July 17, 2014, paragraph 127; Report No. 57/96, Andrews, United States, IACHR Annual Report, 1997, paragraphs 170-171.

⁹⁷ IACHR, The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, paragraph 41.

⁹⁸ IACHR, Report No. 78/07, Case 12.265, Merits (Publication), Chad Roger Goodman, Bahamas, October 15, 2007, paragraph 34.

⁹⁹ IACHR, The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, pg. 91.

¹⁰⁰ See, in this regard, IACHR, The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition, OEA/Ser.L/V/II.Doc. 68, December 31, 2011.

¹⁰¹ IA Court of HR, *Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206. Para. 61.

him, to ensure the participation of the accused in the analysis of the evidence.¹⁰² The Commission reiterates that the guarantee of an adequate defense in cases that may culminate in the imposition of the death penalty must be examined in the strictest possible way. In the words of the IACHR: “Rigorous compliance with the defendant’s right to competent counsel is compelled by the possibility of the application of the death penalty.”¹⁰³

117. An essential part of the exercise of the right to defense is set forth in Article 8.2 f) of the American Convention and the Court has held that among the prerogatives that must be granted to those who have been accused is the right to examine the witnesses who testified for and against him, in the same conditions, in order to defend himself.¹⁰⁴

118. Another fundamental aspect of the right to a defense is the right to appeal a judgment of conviction before a judge or higher court, as recognized in Article 8.2 h) of the American Convention. In order for the remedy provided for in domestic law to fulfill this guarantee:

(...) it must constitute an appropriate means for attempting to correct a wrongful conviction. This requires it to analyze questions of fact, evidence, and law upon which the contested judgment is based, since in judicial activity there is interdependence between the factual determinations and the application of law in such a way that an erroneous finding implies a wrong improper application of law. Consequently, the reasons for which the remedy is admissible should allow for extensive control of the contested aspects of the sentence.¹⁰⁵

119. For its part, the IACHR has noted that “the right to appeal does not necessarily entail a full retrial or a new “hearing,” as long as the court conducting the review can look at the factual dimensions of the case.¹⁰⁶ What the norm requires is the opportunity to point out and get an answer to possible errors of various kinds that the judge or the court may have made, without precluding *a priori* categories such as the facts and weighing and taking the evidence.¹⁰⁷

120. Additionally, adequate and effective exercise of the guarantees of due process described above, are heavily dependent upon the technical defense that may be available to the person undergoing criminal proceedings. The Inter-American Court has held that the right of defense encompasses an effective, timely defense, mounted by a trained professional, to aid in strengthening the defense of the concrete interest of the defendant and not as a simple means to formally comply with the legitimacy of the proceedings. Therefore, any form of mere appearance of a defense would amount to a violation of the American Convention.¹⁰⁸

121. In the case of *Ruano Torres v. El Salvador*, the Inter-American Court ruled on the circumstances in which States may be held responsible as a consequence of deficient and negligent

¹⁰² IA Court of HR, *Case of Barreto Leiva v. Venezuela*. Merits, Reparations and Costs. Judgment of November 17, 2009. Series C No. 206. Para. 54.

¹⁰³ IACHR, *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OEA/Ser.L/V/II.Doc. 68, December 31, 2011, pg. 131.

¹⁰⁴ IACHR. Report No. 76/11. Case 11.769 A. Merits. J. Peru. July 20, 2011. Para. 254; IA Court of HR, *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137. Para. 152. Citing: IA Court of HR, *Case of Lori Berenson Mejía v. Peru*. Judgment of November 25, 2004. Series C No. 119, para. 184; and IA Court of HR, *Case of Castillo Petruzzi et al v. Peru*. Judgment of May 30, 1999. Series C No. 52, para. 154.

¹⁰⁵ IA Court of HR. *Case of Mohamed v. Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 23, 2012. Series C No. 255, para.100.

¹⁰⁶ IACHR, Report No. 33/14, Case 12.820, Merits, Manfred Amrhein et al, Costa Rica, April 4, 2014, Para.192.

¹⁰⁷ IACHR, Report No. 172/10, Case 12.561, Merits, César Alberto Mendoza et al (Juveniles sentenced to Life Time Imprisonment), Argentina, November 2, 2010, para. 189.

¹⁰⁸ IA Court of HR. *Ruano Torres v. El Salvador*. Para. 158.

performance of public defense. Specifically, the Court held that, in order to analyze whether there has been a potential violation of the right to defense by the State, it must be assessed whether the act or omission of the public defender constituted harmful negligence or a manifest failure in the exercise of the defense which had or could have a decisive adverse effect on the interests of the defendant.¹⁰⁹

122. In the same case, the Court made reference to judges' role in exercising control over the performance of public defenders and their correlative obligation to intervene whenever necessary to safeguard said right on behalf of the defendant. In the Court's own words:

(...) the State can be held internationally responsible, additionally, by the response provided through the judicial bodies with respect to acts or omissions attributable to public defenders. If it is evident that the public defense acted without due diligence, a duty of protection or control falls upon the judicial authorities. The judicial function must make sure that the right to a defense does not become illusory through ineffective legal assistance. In this same vein, the function of safeguarding due process, which judicial authorities must exercise, is essential.¹¹⁰

123. Consequently, the Court held that States can also be held internationally responsible, when harmful negligence or manifest failure of the defense should have been evident to the judicial authorities or was brought to their attention and the necessary and sufficient measures were not taken to prevent and/or cure the violation of the right to defense.¹¹¹

124. The Commission underscores that enforcement of procedural guarantees is the responsibility of both defense attorneys, as representatives, and of justice operators as competent authorities, called upon to ensure due process of law. The Commission stresses that judges play an essential role in upholding respect and guarantee of the rights to protection and due process of law.¹¹²

125. Lastly, Article 25 of the Convention provides that States must offer an adequate and effective remedy against acts violating rights established in the Convention as well as in the law.¹¹³

2.2 Analysis of the case

126. The Commission has identified three arguments put forward by the petitioners as to due process violations. The first one pertains to regarding as proven fact, certain facts that were not included in the formal charges. The second argument relates to the inability to introduce exculpatory evidence because Mr. Ruiz Fuentes' defense attorney did not meet a formal requirement. And the third one, involves the right to appeal the judgment.

127. As to the first argument, the Commission notes that it does not have a copy of the formal charging document to be able to rule on the aforementioned discrepancy between the facts listed in the indictment and those deemed to be proven in the judgment of conviction. The Commission does not have detailed enough information either about what occurred over the course of the trial proceedings. Accordingly, the IACHR does not have enough evidence to be able to establish whether the alleged discrepancy did exist and whether it was of such significance that it could have been deemed as something out of order against

¹⁰⁹ IA Court of HR. *Ruano Torres v. El Salvador*. Para. 164.

¹¹⁰ IA Court of HR. *Ruano Torres v. El Salvador*. Para. 168.

¹¹¹ IA Court of HR. *Ruano Torres v. El Salvador*. Para. 172.

¹¹² IACHR, *Guarantees for Independence of Justice Operators. Toward Strengthening Access to Justice and the Rule of Law in the Americas*, OEA/Ser.L/V/II.Doc.44, December 5, 2013, para.16.

¹¹³ IA Court of HR. *Case of Castillo Páez v. Peru*. Merits. Judgment of November 3, 1997. Series C No. 34, para. 82; *Case of Claude Reyes et al v. Chile*. Merits. Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 131, and *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 183, para. 78.

which Mr. Ruiz Fuentes could not have mounted a timely defense. Notwithstanding the foregoing, the Commission will take this argument into account when examining whether the appeal – the context in which Mr. Ruiz Fuentes made this argument – fulfilled the requirements of Article 8.2 h) of the Convention.

128. With respect to the second argument, as was recounted in the proven facts section, the alleged victim was precluded from introducing evidence on his behalf during the trial proceedings, because the person who exercised his defense “failed to sign and seal the [evidence] introduction brief [memorial],” and therefore, the sentencing court “did not admit it for processing.” In the judgment on the special appeal, the Chamber found that “if the proposed evidence was rejected it was because of a technicality of form” in how it was submitted.

129. The Commission recognizes that Mr. Ruiz Fuente’s defense was a private defense attorney. As such, the State cannot be found responsible for the performance of said defender in and of itself. Nonetheless, as was noted in the previous section, the role of the State as guarantor of due process is not only to have a suitable public defender system in place. The obligations of the State in this subject matter extend to the role of judges in overseeing case proceedings to ensure that all persons standing criminal trial are able to exercise their right of defense. Thus, with the understanding that the State of Guatemala cannot be responsible for an omission of a private attorney, the IACHR will analyze potential international responsibility of the State from the perspective of the actions of judicial authorities.

130. The Commission finds that the error of Mr. Ruiz Fuentes’ attorney did not constitute an irrelevant mistake in the proceeding nor can it be construed either as a defense strategy. On the contrary, it was a failure to comply with a formal procedural requirement that had a very severe impact on the ability for Mr. Ruiz Fuentes to defend himself, in other words, it precluded him from offering any exculpatory evidence.

131. In light of this situation and of the foregoing considerations, the Commission finds that the actions of the judicial authorities in a case involving potential imposition of the death penalty allowed the infringement of the right to a defense of Mr. Ruiz Fuentes to build in not accepting the evidence offered by him on the grounds of non-compliance with a formal procedural requirement, without offering any opportunity for said failure to comply with the formality to be cured by the same defense attorney or by another person appointed by the State or by someone who Mr. Ruiz Fuentes could have appointed in response to the incompetence of his defense attorney. In other words, the serious impact that rejecting the defense’s exculpatory evidence would have on the exercise of the right to a defense of Mr. Ruiz Fuentes should have been obvious to the judicial authority, who nonetheless adopted a passive attitude and not that of a guarantor of the strictest compliance with due process as explained above.

132. This passiveness is particularly grievous because of the possibility that the case may culminate in the imposition of the death penalty. This mere fact places on the judicial authority a special duty of enforcer of strict compliance with due process guarantees, including the right to a technical defense. In not acting in manner consistent with this duty, the failure of the judicial authority hearing the case renders the State internationally responsible.

133. As for the third argument, the Commission recalls that the alleged victim filed a special appeal against the judgment condemning him to the death penalty, arguing among other things that the facts described in the charging document did not match those for which he was convicted and that some of these facts were essential to prove commission of the crime of abduction or kidnapping. In response to this argument, the Panel of Judges refrained from ruling on the substance, noting in its decision that “it cannot in any case mention evidence or facts that are declared proven” by the Sentencing Court and, consequently confined itself to upheld the assessment of the facts and evidence made by the trial court. This decision was upheld through the remedy of cassation, an appeal to the Supreme Court of Justice.

134. Pursuant to Article 419 of the Code of Criminal Procedure “(...) a special appeal of judgment may only be filed when the judgment contains any of the following flaws: 1) Of substance: non-observance, improper or erroneous interpretation of the law. 2) Of procedure: Non-observance or erroneous application of the law, which constitutes a procedural defect. In this case, the appeal shall only be admissible if the

interested party has filed a timely motion to cure it or an objection for annulment, except in the instances of the following article.”

135. Additionally, in referring to a judgment of a special appeal, Article 430 of the same Code establishes the principle of intangibility of the evidence as follows: “the judgment shall never mention the evidence or the facts that are declared proven pursuant to the rules of free and reasoned judgment. It may only refer to them for the application of the substantive law when there is a manifest contradiction in the appealed judgment.”

136. The Commission recalls that in accordance with the standards described above, the right to appeal judgment is not satisfied when certain categories such as the facts and evidence are precluded from being verified or evaluated, as occurred in the case before us. The Commission notes that the way in which the appellate court decided in the instant case stems from the very way in which the appeal is regulated, with grounds limited to errors of law and of procedure, but excluding from analysis, as a general rule, the review of the facts and evaluation of the evidence.

137. Lastly, the Commission finds that none of the remedies pursued by Mr. Ruiz Fuentes were effective, inasmuch as the merits of the due process issues raised by him were not examined. Accordingly, notwithstanding the formal existence of multiple remedies, the alleged victim did not have available to him an effective review of the claims regarding due process.

138. Based on the foregoing, the Commission finds that the State of Guatemala violated the rights established in Articles 8.2 c), 8.2 f), 8.2 h) and 25.1 of the American Convention in connection with Articles 1.1 and 2 of the same instrument, to the detriment of Hugo Humberto Ruiz Fuentes. Additionally, as a consequence of these decisions, the Commission concludes that after following a procedure that did not respect due process rights, the death penalty was arbitrarily imposed on Mr. Ruiz Fuentes, in violation of the right to life enshrined in Article 4 of the American Convention.

3. Analysis as to whether the imposition of the death penalty in the case of kidnapping violated the Convention

3.1 General considerations

139. The Commission recalls that pursuant to the text of the final sentence of Article 4.2 of the American Convention, the application of the death penalty shall not be extended to crimes to which it did not apply at the time of ratification of the American Convention.

140. Furthermore, Article 4.2 prohibits mandatory imposition of the death penalty, meaning that in the instances permitted by the American Convention, said penalty must only be imposed through individual court decisions and cannot be an automatic or compulsory punishment. Additionally, the accused must have the right to plead and provide evidence with respect to any possible extenuating circumstances relating to the person and the crime. Also, the court handing down the sentence must have the discretionary power to consider those factors in determining whether the death penalty is an admissible and adequate punishment.¹¹⁴

141. Both the Court and the Commission have already examined the crime of abduction or kidnapping, as defined in Article 201 of the Guatemalan Criminal Code and applied to the alleged victim in the instant case and in the case of *Raxcacó Reyes vs. Guatemala*, in light of Article 4.2 of the American Convention. In its analysis, both bodies of the system cited both of the aforementioned standards, that is, the standard prohibiting extending the death penalty; and the standard prohibiting automatic application of the death penalty.

¹¹⁴ IACHR. *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OEA/Ser.L/V/II.Doc.68, December 31, 2011, pg.48.

142. As was described in the proven facts, Article 201 of the Criminal Code established that perpetrators of abduction or kidnapping must be given the death penalty and that in that instance “no mitigating circumstance shall be assessed.” In other words, it imposed the death penalty based solely on the category of crime of which the accused was considered guilty.¹¹⁵ Said article is the consequence of a reform subsequent to ratification of the American Convention by the State of Guatemala. At the time of ratification, the death penalty for the crime of kidnapping was only allowed in cases in which the victim of the kidnapping died.

143. Thus, as for the first prohibition listed above, the IACHR found that “by introducing the reform to the Guatemalan Criminal Code under Legislative Decree 81/96, it eliminated the ability to consider the result of the unlawful conduct as a determinative element of the seriousness of the crime and, therefore, a guideline to the severity of the applicable punishment, the State violated the restrictive spirit of the American Convention, whose purpose it is to prevent any extension of the catalogue of crimes punished with the death penalty.”¹¹⁶

144. The Inter-American Court found that “although the *nomen iuris* of kidnapping or abduction remained unaltered from the time Guatemala ratified the Convention, the factual circumstances contained in the corresponding crime categories changed substantially, to the extent it made it possible to apply the death penalty for actions that were not punishable by this sanction previously. If a different interpretation is accepted, this would allow a crime to be substituted or altered with the inclusion of new factual assumptions, despite the express prohibition to extend the death penalty contained in Article 4.2 of the Convention.”¹¹⁷

145. As to the second prohibition, the IACHR found that Article 201 of the Guatemalan Criminal Code imposes the death penalty mandatorily and automatically, and that “in order for the imposition of the death penalty to be consistent with Articles 4, 5, 8 and 25 of the Convention, there must be an effective mechanism whereby the accused is able to submit arguments and evidence before the Court that is passing judgment on whether the death penalty is a permissible and appropriate punishment in the circumstances of his case.”¹¹⁸ Consequently, it concluded that “by imposing the mandatory death penalty on Mr. Raxcacó Reyes, the Guatemalan State violated his right to not be arbitrarily deprived of his life, enshrined in Article 4.1 of the Convention.”¹¹⁹ The Inter-American Court ruled similarly in the judgment of said case, concluding that Article 201 of the Guatemalan Criminal Code violates the prohibition to arbitrarily deprive a person of their life, as established in Article 4.1 and 4.2 of the Convention.¹²⁰

146. Along the same lines and connecting the second prohibition described above to the right to effective remedy, in a case with respect to Bahamas, the IACHR established, in reference to the death penalty, that “by reason of its compulsory and automatic application, a mandatory sentence cannot be the subject of an effective review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was found guilty of a crime for which the sentence was

¹¹⁵ IACHR, Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights in the Case: Ronald Ernesto Raxcacó Reyes, Case 12.402 against the Republic of Guatemala, para.48.

¹¹⁶ IACHR, Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights in the Case: Ronald Ernesto Raxcacó Reyes, Case 12.402 against the Republic of Guatemala, para. 95.

¹¹⁷ IA Court of HR. Case of Raxcacó Reyes v. Guatemala. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 133, para.66.

¹¹⁸ IACHR, Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights in the Case: Ronald Ernesto Raxcacó Reyes, Case 12.402 against the Republic of Guatemala, para. 48.

¹¹⁹ IACHR, Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights in the Case: Ronald Ernesto Raxcacó Reyes, Case 12.402 against the Republic of Guatemala, para. 77.

¹²⁰ IA Court of HR. Case of Raxcacó Reyes v. Guatemala. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 133, para. 82; also see IACHR, Fifth Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.111 Doc.21 rev. April 6, 2001, para. 66 et seq.

mandated.”¹²¹ In the application of the case of *Raxcacó Reyes v. Guatemala*, the IACHR reiterated the foregoing points and added that “the mandatory nature of the sanction precludes a court of review from considering whether the death penalty was the adequate punishment to the conditions of the convicted person and to the particular circumstances of the case, as well as the proportionality between the crime and the punishment.”¹²² The Commission stresses that automatic application of the death penalty means that justice operators are unable to take into account extenuating circumstances to ensure that the death penalty is imposed only for the most serious crimes.

147. Additionally, and by way of a third relevant obligation in the analysis of the instant case, the IACHR recalls that under Article 4.6 of the American Convention, every person has the right to petition for amnesty, pardon or commutation of the sentence and the sentence cannot be executed while said petition is pending decision. In the case of *Fermín Ramírez v. Guatemala*, the Inter-American Court held that this right “forms part of the international *corpus juris*, specifically of the American Convention and the International Covenant of Civil and Political Rights.”¹²³ Likewise, the Inter-American Court, as was noted in the contextual section of the instant report, cited the repeal of Decree 159 in Guatemala and enactment of Decision 235-2000, under which no body of the State has the power to hear and decide a petition for pardon.

3.2 Analysis of the case

148. In the instant case, the Commission notes that Article 201 of the Criminal Code was applied and the content of this Article was previously examined by the Inter-American Court and the Commission, as explained in the previous section.

149. Accordingly and pursuant to the standards described above emanating from Article 4.2 of the American Convention, the State of Guatemala is responsible for the imposition of the death penalty on Mr. Ruiz Fuentes for a particular conduct – kidnapping not followed by death – which was not included as warranting the death penalty at the time of ratification of said instrument by the State. Additionally, the State is responsible for imposition of an automatic death penalty without specific considerations about the individual situation of Mr. Ruiz Fuentes, which made the most severe punishment possible applicable to his case.

150. The judgments reflect the application of the norm that prohibited the consideration of extenuating factors and, consequently the application, without any individual consideration of the circumstances of the crime or the convict, of the only punishment provided for by law.

151. Moreover, the IACHR notes that despite the fact that the alleged victim argued repeatedly in the criminal proceeding that application of the death penalty ran counter to the American Convention, the courts at both the trial and appellate levels ruled that said punishment was applicable, under an interpretation that there was no extension of the death penalty involved, inasmuch as the crime of kidnapping was previously punishable by the death penalty. As was noted in the previous paragraph, the interpretation of both bodies of the system has been that there was indeed an extension in violation of Article 4.2 of the Convention. Additionally, the domestic courts did not examine the issues of automatic application of the death penalty. In keeping with the above-referenced standards, the IACHR finds that in addition to the violation of Article 4.2 of the Convention, Mr. Ruiz Fuentes did not have any effective remedy available to him to challenge the death penalty that was imposed on him.

¹²¹ IACHR, Report No 48/01, Case No. 12.067 et al, Michael Edwards et al, Bahamas, April 4, 2001, paras. 135-154; also see Press Release, [CIDH insta a los Estados eliminar la pena de muerte o aplicar moratoria en su aplicación](#), [‘IACHR Urges States to Abolish Death Penalty or Apply a Moratorium on its Application’] October 9, 2013.

¹²² IACHR, Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights in the Case: Ronald Ernesto Raxcacó Reyes, Case 12.402 against the Republic of Guatemala, para. 80.

¹²³ IA Court of HR. Case of Fermín Ramírez v. Guatemala. Judgment of June 20, 2005. Series C No. 126, para. 110.

152. Furthermore, as to the obligation stemming from Article 4.6 of the Convention, the IACHR recalls that the alleged victim filed a petition for pardon with the Ministry of the Interior on December 16, 2003. The State did not provide any information to indicate that said remedy had been ruled upon, but only noted that at the time the petition was lodged with the IACHR, said remedy was in effect and, therefore, the alleged victim should have exhausted said procedure. As was described in the proven facts, through Government Decision 235-2000, said remedy was expunged from the books of Guatemalan law.

153. Based on the foregoing considerations, the IACHR concludes that the Guatemalan State violated the rights established in Articles 4.1, 4.2, 4.6 and 25.1 of the American Convention to the detriment of Hugo Humberto Fuentes, by imposing the mandatory death penalty, for conduct that was not punishable by it at the time the Guatemala State ratified the American Convention, and by not guaranteeing either access to an effective remedy to challenge the punishment imposed on him, or a petition for pardon. Accordingly, in view of the fact that the State applied a provision of law, which runs afoul of the Convention, the IACHR concludes that, in addition to the obligations set forth in Article 1.1, the Guatemalan State also violated Article 2 of the American Convention.

B. Right to humane treatment¹²⁴ with respect to the death row phenomenon and relevant provisions of the IACPPT¹²⁵

154. In cases of persons sentenced to the death penalty, both in international human rights law and in comparative law, an analysis has gradually been fleshed out over the decades of the death row phenomenon in light of the prohibition of cruel, inhuman and degrading treatment, as provided for in constitutions as well as in many international instruments, including the American Convention.

155. As for the concept of this phenomenon, the United Nations Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has written that:

(...) It consists of a combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death.¹²⁶ These circumstances include the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held. Death row conditions are often worse than those for the rest of the prison population, and prisoners on death row are denied many basic human necessities.¹²⁷

156. In the case of *Soering v. United Kingdom*, the European Court of Human Rights, in interpreting the provision prohibiting cruel, inhuman and degrading treatment and addressing the death penalty, wrote that:

¹²⁴ Article 5 of the American Convention establishes in the relevant portions:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

¹²⁵ Articles 1 and 6 of the IACPPT establish that:

Article 1. The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

Article 6. In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction. The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature. The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

¹²⁶ United Nations. Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. August 9, 2012. A/67/279, Para. 42. Citing. Patrick Hudson, "Does the Death Row Phenomenon Violate a Prisoner's Rights Under International Law", *European Journal of International Law*, vol. 11, núm. No. 4, pgs. 834 to 837.

¹²⁷ United Nations. Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. August 9, 2012. A/67/279, Para. 42.

The way in which it [the death penalty] is imposed or executed, the personal circumstance of the person condemned and the disproportionality with the seriousness of the crime committed, as well as conditions of detention while awaiting execution, are examples of factors that could render applicable, to the treatment or punishment received by the condemned person, the prohibition established in Article 3.¹²⁸

157. In said decision, the European Court took into account an average of 6 to 8 years on death row from the time of the imposition of the punishment to execution and addressed the way in which the proceedings themselves and subsequent remedies to imposition of the death penalty are related to the aforementioned delay on death row. Despite this relationship, the European Court held that:

(...) even though it is true that a certain lapse of time between the sentencing and the execution is inevitable, if the guarantees of appeal are granted to the person condemned [to the death penalty], it is also [inevitable], which is part of human nature, that a person will cling to life through the use of such guarantees to the fullest extent possible. Nonetheless, even when complex proceedings subsequent to the sentencing in Virginia are well intended and even potentially beneficial to the convicted person, the consequence is that said person must endure for many years the conditions of death row and of anguish and high stress of living under the constant shadow of death.¹²⁹

158. Likewise, in the case of *Al-Saadon and Mufdhi v. United Kingdom*, the European Court held that “judicial execution entails deliberate and premeditated destruction of the human being by the State authorities. Whatever the method of execution, the extinguishment of life entails physical pain. Additionally, the foreshadowing of death at the hands of the State must inevitably give rise to intense psychological suffering.”¹³⁰ It also concluded that the well-grounded fear of the applicants, that Iraqi authorities would execute them, from May 2006 to July 2009, had to have subjected them to significant mental suffering, which constituted inhumane treatment in violation of Article 3 of the Convention.¹³¹

159. Elsewhere, the Supreme Court of Uganda found in 2009 that “to execute a person after a delay of three years in unacceptable conditions pursuant to the standards of Uganda would constitute cruel and inhumane punishment.”¹³² In turn, the Supreme Court of Zimbabwe held since 1993 that taking into consideration the academic and judicial consensus with respect to the death row phenomenon, protracted delays and severe conditions of detention have reached a sufficient degree of seriousness to allow the claimant to seek relief through the prohibition of torture and inhuman or degrading punishment. Said Supreme Court held that 52 and 72 months, respectively, on death row, constituted a violation of the prohibition of torture and would render execution unconstitutional.¹³³

160. Mr. Ruiz Fuentes was sentenced to the death penalty on May 14, 1999. The State reported that by virtue of the decision of the Inter-American Court in the context of the processing of provisional measures, on February 15, 2005 it decreed “temporary suspension of execution of the death penalty.”

¹²⁸ ECtHR. Case of *Soering v. The United Kingdom*. Application No. 14038/88. Judgment, 07 July 1989. Para. 104.

¹²⁹ ECtHR. Case of *Soering v. The United Kingdom*. Application No. 14038/88. Judgment, 07 July 1989. Para. 106.

¹³⁰ ECtHR. Case of *Al-Saadon and Mufdhi v. The United Kingdom*. Application No. 61498/08. Judgment 2 march 2010 Para. 115. Also see the case of *Bader and Knabor v. Sweden*, in which the European Court held that to impose a death sentence on a person after an unfair trial, in circumstances where there exists a real possibility that the sentence will be executed, causes a significant degree of anguish and human fear, in violation of Article 3 of the Convention. ECtHR. Case of *Bader and Knabor v. Sweden*. Application no.13284/04. Judgment 8 November 2005. Pg.10.

¹³¹ ECtHR. Case of *Al-Saadon and Mufdhi v. The United Kingdom*. Application No. 61498/08. Judgment 2 march 2010 Para. 137.

¹³² Supreme Court of Uganda in *Attorney General v. Susan Kigula and 417 others* (Constitutional Appeal No. 3 of 2006), 2009.

¹³³ Judgment of the Supreme Court of Zimbabwe of 24 June 1993 in *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General* (4) SA 239 (ZS).

Additionally, as was noted in the proven facts section, the alleged victim escaped from prison on October 22, 2005 and died on November 14, 2005.

161. The Commission deems it appropriate to count the period in which the victim was on death row from the time of his sentencing until his escape from prison. Even though the imposition of the death penalty was suspended in February 2005, the provisional nature thereof does not create certainty that he will not be executed in the future and, therefore, the condemned person continues to live his time with a real possibility that it takes place. As such, Mr. Ruiz Fuentes remained there awaiting his execution for more than 6 years and 5 months.

162. The Commission finds that the time Mr. Ruiz Fuentes waited after being sentenced to the death penalty in a proceeding in which several due process rights were violated, awaiting for an extended period of time for said punishment to be executed rises to a level of seriousness to be deemed as cruel, inhuman and degrading treatment and, consequently, concludes that the Guatemalan State violated, to the detriment of Hugo Humberto Ruiz Fuentes, the right to humane treatment set forth in Articles 5.1 and 5.2 of the American Convention, in connection with Article 1.1 of the same instrument. Additionally, the State is responsible for the violation of Articles 1 and 6 of the IACPPT.

C. Right to humane treatment,¹³⁴ a fair trial¹³⁵ and judicial protection¹³⁶ with respect to the arrest and alleged torture and relevant provisions of the IACPPT¹³⁷

1. General considerations

163. The IACHR has emphasized that the American Convention bans the imposition of torture or cruel, inhuman or degrading treatment or punishment on persons in any circumstance. The Commission has noted “one essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law that creates obligations *erga omnes*.”¹³⁸ Additionally, the IACHR has called the prohibition of torture a norm of *jus cogens*.¹³⁹

164. In turn, the Court has held repeatedly that “International Human Rights Law strictly prohibits torture and cruel, inhuman, or degrading punishment or treatment. The absolute prohibition of torture, both physical and psychological, is currently part of the domain of the international *jus cogens*.”¹⁴⁰ Said prohibition remains valid even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and other crimes, state of siege, or a state of emergency, civil commotion or domestic

¹³⁴ The relevant portions of Article 5 of the Convention appear in an earlier footnote.

¹³⁵ The relevant portions of Article 8 of the Convention appear in an earlier footnote. Article 8.2 of said instrument is added to this section, which enshrines “the right not to be compelled to be a witness against himself or to plead guilty.”

¹³⁶ The relevant portions of Article 25 of the Convention appear in an earlier footnote.

¹³⁷ The relevant portions of Articles 1 and 6 of the IACPPT appear in an earlier footnote. Article 8 of said instrument is added to this section, which reads: The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case. Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

¹³⁸ IACHR, Report on Terrorism and Human Rights, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002. Citing IACHR, Report on the Situation of Human Rights of Asylum Seekers in the Context of the Canadian System of Determination of Refugee Status, OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, para. 118.

¹³⁹ IACHR, Report on Terrorism and Human Rights, OEA/SER.L/V/II.116, Doc. 5 rev. 1, corr., October 22, 2002. Citing IACHR, Report on the Situation of Human Rights of Asylum Seekers in the Context of the Canadian System of Determination of Refugee Status, OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, para. 154.

¹⁴⁰ IA Court of HR. Case of Bueno Alves v. Argentina. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, para. 76; IA Court of HR. Case of Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs. Judgment November 25, 2006. Series C No. 160, para. 271; and IA Court of HR. Case of Baldeón García v. Peru. Merits, Reparations and Costs. Judgment of April 6, 2006. Series C No. 147, para. 117.

conflict, suspension of constitutional guarantees, domestic political instability or other public emergencies or catastrophes.¹⁴¹ The Court has also noted that universal and regional treaties enshrine this prohibition and the inderogable right not to be tortured. Likewise, numerous international instruments enshrine that right and reiterate the same prohibition, even under international humanitarian law.¹⁴²

165. Pursuant to the legal precedents of the Inter-American system, in order for conduct to be deemed as torture several requirements must be met: i) it must be an intentional act committed by an agent of the State or with his authorization or acquiescence; ii) it must cause severe physical or mental suffering and iii) it must be committed with a given purpose or aim.¹⁴³

166. The Commission also recalls, with regard to the infringements endured by persons under the custody of the State, that pursuant to the consistent legal precedents of the Inter-American Commission and Court, whenever a person is arrested in normal health and subsequently appears with health problems, it is the responsibility of the State to provide an explanation of that situation. Consequently, there is a presumption of holding the State responsible for injuries exhibited by a person who has been under the custody of State's agents. In such circumstances, it is the obligation of the State to provide a satisfactory and compelling explanation about what transpired and disprove allegations of its liability, by means of adequate proof.¹⁴⁴

167. The Inter-American Court has held that when there is a complaint or probable cause to believe that an act of torture has been committed, the State has an obligation to immediately open an effective investigation *ex officio* to aid in identifying, prosecuting and punishing those responsible, in keeping with the general obligation to ensure the human rights enshrined in the Convention of all persons under its jurisdiction, as established in Article 1.1 of this instrument, in conjunction with the right to humane treatment.¹⁴⁵ This investigation must be conducted through all legal available means and be aimed at finding

¹⁴¹ IA Court of HR. Case of Bueno Alves v. Argentina. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, para. 76; IA Court of HR. Case of Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs. Judgment November 25, 2006. Series C No. 160, para. 271; and IA Court of HR. Case of Baldeón García v. Peru. Merits, Reparations and Costs. Judgment of April 6, 2006. Series C No. 147, para. 117.

¹⁴² IA Court of HR. Case of Bueno Alves v. Argentina. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, para. 77. Citing: International Covenant on Civil and Political Rights, Article 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 2; Convention on the Rights of the Child, Article 37, and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 10; Inter-American Convention to Prevent and Punish Torture, Article 2; African Charter on Human and People's Rights, Article 5; African Charter on the Rights and Welfare of the Child, Article. 16; Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), Article 4, and the European Convention for the Protection of Human Rights and Fundamental Liberties, Article 3; Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, Principle 6; Code of Conduct for Law Enforcement Officials, Article 5; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 87(a); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live, Article 6; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 17.3; Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Article 4; and Guidelines of the Committee Of Ministers of the Council of Europe on Human Rights and Fight against Terrorism, Guideline IV; and Common Article 3 to the four Vienna Conventions; Geneva Convention relative to the Treatment of Prisoners of War (Convention III), Arts. 49, 52, 87 and 89, 97; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), Arts. 40, 51, 95, 96, 100 and 119; Protocol additional to the Geneva Conventions of August 12, 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 75.2.ii, and Protocol Additional to the Geneva Conventions of August 12, 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 4.2.a.

¹⁴³ IACHR, Report No. 5/96, Case 10.970, Merits, Raquel Martin Mejía, Peru, March 1, 1996, section 3. Analysis and IA Court of HR. Case of Bueno Alves v. Argentina. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, para. 79.

¹⁴⁴ IACHR. Report 172/10. Merits, César Alberto Mendoza et al (Juveniles sentenced to Life Time Imprisonment), Argentina, November 2, 2010, para. 298; IA Court of HR. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 26, 2010 Series C No. 220, para. 134 and IA Court of HR. Case of Mendoza et al v. Argentina. Preliminary Objections, Merits and Reparations. Judgment of May 14, 2013 Series C No. 260.

¹⁴⁵ IA Court of HR, *Case of Baldeón García*. Merits, Reparations and Costs. Judgment of April 6, 2006. Series C No. 147, para. 156; *Case of Gutiérrez Soler*. Merits, Reparations and Costs. Judgment of September 12, 2005. Series C No. 132, para. 54; *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para. 159 and Case of Ximenes Lopes. Merits, Reparations and Costs. Judgment July 4, 2006. Series C No. 149, para. 148. Similarly, see, *Eur.C.H.R., Assenov and others v. Bulgaria*, no. 90/1997/874/1086, Judgment of 28 October 1998, par. 102 and *Eur.C.H.R., Ilhan v. Turkey* [GC], no. 22277/93, Judgment of 27 June 2000, paras. 89-93.

out the truth and the investigation, search, arrest, prosecution and punishment of all persons responsible for the acts.¹⁴⁶ The obligation to thoroughly investigate acts of torture is all the more important when such acts take place while the victim is under the custody of the State.¹⁴⁷

168. According to the Court, in instances where there are allegations of torture and mistreatment, the elapsed time until the respective forensic medical expert inspections and examinations are conducted is essential in order to conclusively determine the existence of the harm, especially when there are no witnesses besides the perpetrators and the victims themselves and, consequently, other evidence may be sparse. Needless to say, in order for an investigation into acts of torture to be effective, it must be carried out promptly.¹⁴⁸

169. Likewise, the United Nations Committee against Torture has established that when torture is alleged, in every instance an examination must be conducted by an independent physician pursuant to the Istanbul Protocol.¹⁴⁹ In accordance with said instrument, the medical evaluation must include: i) case information; ii) clinician's qualifications (for judicial testimony); iii) statement regarding the veracity of testimony (for judicial testimony); iv) background information; v) allegations of torture and ill-treatment; vi) physical symptoms and disabilities; vii) psychological history/examination; viii) photographs; ix) diagnostic test results; x) consultations; xi) interpretation of findings; xii) conclusions and recommendations; xiii) statement of truthfulness; n) statement of restrictions on the medical evaluation/investigation; xiv) clinician's signature, date, place; xv) relevant annexes.¹⁵⁰

2. Analysis of case

170. Next, the Commission will examine the allegations of the torture of Hugo Humberto Ruiz Fuentes in light of the considerations explained above, both with respect to torture and the elements constituting it, as well as with respect to the duty to investigate a complaint or probable cause of torture. The Commission recalls that the alleged victim claimed to have been tortured by members of the Police force, at the time of his arrest, on August 6, 1997.

2.1 About the evidence of infringement of the right to humane treatment

171. Regarding the occurrence of infringements of Mr. Ruiz Fuentes right to humane treatment, the Commission summarizes hereunder the available evidence that was described in the proven facts section.

172. Firstly, the alleged victim described his arrest in his statement of April 29, 1998 noting that when he was riding in a vehicle he was intercepted by individuals who were driving in two vehicles, they put him into a beige van and according to his claim: "they beat my intestine, ribs and they asked about several kidnappings since I was not saying anything to them they hit me." He further recounted the following: "they beat me with a stick that had like a sponge on it because I only felt the pain inside." He also stated that afterwards he was taken to an "unknown house where they took me out, with my pants and underwear down,

¹⁴⁶ IA Court of HR. Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela. Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para.79.

¹⁴⁷ IA Court of HR. Case of Bueno Alves v. Argentina. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, para. 109.

¹⁴⁸ IA Court of HR. Case of Bueno Alves v. Argentina. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, para.111.

¹⁴⁹ Committee against Torture. Consideration of Reports submitted by the States Parties under Article 19 of the Convention. CAT/c/MEX/CO/4. February 6, 2007.

¹⁵⁰ See: Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment "Istanbul Protocol." Office of the United Nations High Commissioner for Human Rights, United Nations, New York and Geneva, 2001.

they threw me off the van, a tall man was at the location I believe he is DON CONTE COJULUN and he told them to get me up because I could die (...)they took me to the hospital in a pick up of Ciprosi (...) after about three days of being in the hospital a man came who claimed to be police chief SOTO (..) and they came three times, then another three came as private individuals and they brought me juices, telling me to not say anything about what had happened to me, that I should say that I had fallen from a house where I had jumped (...).

173. Secondly, several medical reports appear in the case file, which attest that Mr. Ruiz Fuentes was admitted on August 6, 1997 to Roosevelt Hospital and that he indeed presented injuries. In this regard, reports are available from December 9, 1997, January 20, 1998, February 13, 1998 and December 11, 2000. In the reports, reference is made to “hemoperitoneum,” “multiple contusions and erosions of the mesentery of the small intestine,” “laceration of the transvers mesocolon which leaves without a segment of more or less 10cs to more or less 15cms of the splenic flexure,” “bleeding greater omentum vessels,” “hepatic trauma G-I in segment VI,” “closed abdomen trauma,” “Segment of Transverse Colon without Irrigation with Irreversible Vascular Changes,” “hepatic trauma,” “multiple injuries and contusions at the level of the abdomen, abdomen rounded and painful to the touch,” among other conditions.

174. The Commission finds that, based on the medical reports, as well as the statement from the alleged victim, it is clear that Mr. Ruiz Fuentes suffered injuries in the context of his arrest. In this regard, since Mr. Ruiz Fuentes was under the custody of the State during this procedure, the aforementioned standard is applicable for the State to offer a credible explanation about the origin of the harm to his personal integrity.

175. The State denied that the alleged victim had been tortured and argued that the injuries that he endured were the consequence of a fall when he was attempting to flee at the time of his arrest and, therefore, he had to be hospitalized. As support for this account, the State provided an Official Letter from the Department of Criminal Investigations of the National Police describing that Mr. Ruiz Fuentes attempted to flee and jumped into a vacant lot from an approximately eight meter high wall, which caused “multiple injuries” and, therefore, he was taken to a hospital where he was diagnosed with “multiple traumas.”

176. The Commission notes that the account given by the State is based exclusively on the statements of the security agents who participated in the arrest operation, who were identified in the aforementioned letter. In other words, the explanation provided by the State for the Mr. Ruiz Fuentes’ injuries was not the result of a criminal investigation. For the purpose of making this point, the Commission has clearly established that the satisfactory explanation required under the Convention in this type of case cannot be an account of the very agents involved without any other corroborative evidence obtained through an investigation in keeping with the obligations of the State in response to a complaint or probable cause of torture.

177. On his own, beyond his statement and the medical reports sought by Mr. Ruiz Fuentes himself and not at the request of the State, the alleged victim does not have any other means to prove his account of the facts. As such, it must be taken into account that the State did not meet its obligation to provide a satisfactory explanation about the injuries exhibited by Mr. Ruiz Fuentes in a state operation through which he came under its custody.

178. The Commission cannot help to notice, as well, that the version of the facts provided by the State is implausible in light of how unusual it would be for a person who falls from 8 meters high to not present other signs of trauma on the head and extremities than abdominal trauma. This consideration is supported by the medical report of May 21, 2008, in which it was concluded that the “intra-abdominal” injuries that were endured by Mr. Ruiz Fuentes are consistent with those caused by a blunt instrument such as described in other medical reports and the statements of other witnesses. In said report, it also states that there is forensic evidence, such as absence of cranial-encephalic trauma and of fractures of the extremities, which supports Mr. Ruiz Fuentes’ version of the facts that he was repeatedly beaten in the abdomen, and not the version of the police agents.

179. Based on the foregoing considerations, the Commission reiterates that the explanation offered by the Guatemalan State does not meet the standard of a satisfactory explanation and, therefore, is unable to disprove the presumption of responsibility for the injuries exhibited by Hugo Humberto Ruiz Fuentes in the context of an operation by its security forces in which he came under the custody of the State. Consequently, the Commission concludes that the injuries, described by Hugo Humberto Ruiz Fuentes and corroborated by the reports, were caused by agents of the State. As the bodies of the Inter-American system have repeatedly held, to conclude otherwise would be tantamount to allowing the State to use non-compliance with its obligation to shirk its responsibility.

2.2 About the legal qualification as torture

180. The Commission shall examine hereunder whether the intensity of the injuries, as well as the purposes of them, can qualify as torture.

181. As for the elements of intentionality and the existence of a given purpose or aim, the Commission notes that, based on the statement of Mr. Ruiz Fuentes, while he was beaten the agents asked him about several kidnappings and since he did not tell them anything, he continued to be beaten. Based on the foregoing statement, in conjunction with the circumstances themselves of the arrest of Mr. Ruiz Fuentes as described by him, which are all the more important due to the failure of the State to investigate, it can be surmised that the motive of the beating was to obtain information or a confession from him, as well as to impair his physical and mental abilities.

182. Regarding the element of intensity of the physical and mental harm, the Commission notes that in the statement of the alleged victim, it appears on record that the he was beaten repeatedly, he was stripped of his clothing and the beating did not stop until a supposed police officer ordered them to stop beating him because he could die. Additionally, as was noted earlier in this report, the descriptions of the medical reports point to injuries inflicted on him being of particular seriousness even requiring Mr. Ruiz Fuentes to be operated on. Furthermore, as is on record in the case file, the aftereffects of said injuries extended out over time.

183. These elements of fact are sufficient to establish the severity of the injuries inflicted on him. In addition, the Commission finds that the forced nudity in and of itself causes a situation of deep fear.

184. Based on the foregoing considerations, the Commission concludes that the injuries caused by the state agents on Hugo Humberto Ruiz Fuentes rise to the level of torture. Additionally, taking into account Mr. Ruiz Fuentes' own description of events, this act was aimed at, among other things, exacting his confession. Consequently, the Commission finds that the State of Guatemala violated the absolute prohibition of torture and the right to not be compelled to self-incriminate, as established in Articles 5.1, 5.2 and 8.2 g) of the American Convention in connection with Article 1.1 of the same instrument, to the detriment of Hugo Humberto Ruiz Fuentes.

2.3 About the investigation into the torture

185. In the previous section, the Commission adjudged as proven that states agents committed acts of torture against Hugo Humberto Ruiz Fuentes.

186. The Commission finds that the obligation to open an investigation into these incidents is triggered immediately after Mr. Ruiz Fuentes was arrested, inasmuch as the mere fact that he was transferred to a hospital at that time, reveals that his physical state or the injuries he was obviously presenting could have been caused by the state agents who participated in said operation. The existence of the state agents' version cannot be construed under any circumstance to be sufficient reason not to open an investigation into the origin of the injuries. As such, the IACHR finds that from the time of the detention, there was good reason to trigger the immediate obligation to investigate what had taken place. This obligation was heightened after Mr.

Ruiz Fuentes' statement of April 1998, in which he described the acts of torture he endured and provided an version of events differing from the official version.

187. Despite the foregoing, thus far, the Guatemalan State has not opened any investigation into these incidents. This failure to act constitutes a clear breach of the duty to investigate when there is a complaint or probable cause of the commission of acts of torture. As was noted in the previous paragraph, in the instant case there was both a complaint and probable cause. Consequently, the IACHR concludes that the Guatemalan State violated the rights enshrined in Articles 8.1 and 25.1 of the American Convention in connection with the obligations established in Article 1.1 of the same instrument, to the detriment of Hugo Humberto Ruiz Fuentes. Additionally, the IACHR concludes that the State breached the obligations set forth in Articles 1, 6 and 8 of the IACPPT.

D. Right to life,¹⁵¹ to a fair trial¹⁵² and to judicial protection¹⁵³ with respect to the death of Hugo Humberto Ruiz Fuentes

1. General considerations

188. The Commission recalls that the right to life is a prerequisite for the enjoyment of all other human rights and without respect for which all the other rights are rendered meaningless.¹⁵⁴ Compliance with Article 4, in connection with Article 1.1 of the American Convention not only presupposes that no person can arbitrarily be deprived of his life, but also requires, pursuant to their obligation to guarantee the full and free exercise of human rights, that the States adopt any and all necessary measures to protect and preserve the right to life of the individuals under their jurisdiction.¹⁵⁵ For its part, the European Court has noted the importance that the right to life be interpreted in such a way that the safeguards thereof are practical and effective.¹⁵⁶

189. Both the Inter-American Commission and the Court have held that in any instance of a display of force, in which states agents have caused the death or injuries of a person, the use of force must be examined.¹⁵⁷ Accordingly, the Commission shall analyze the facts of the case taking into account Inter-American legal precedents on the right to life, in connection with the obligations to respect and guarantee and in the realm of the use of force. For this purpose, the IACHR will take into account several different international instruments dealing with the subject matter and, in particular, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials (hereinafter "Principles on the Use of Force" and "Code of Conduct" respectively).

190. The IACHR has held that even though the State has the right and the obligation to provide protection against threats and for this purpose may use lethal force in certain situations, said purpose must be restricted to when it is strictly necessary and proportionate. If these principles are not upheld, the use of lethal force may constitute an arbitrary deprivation of life or a summary execution. This is tantamount to

¹⁵¹ The relevant portion of Article 4 of the Convention appears in a footnote above.

¹⁵² The relevant portion of Article 8 of the Convention appears in a footnote above.

¹⁵³ The relevant portion of Article 25 of the Convention appears in a footnote above.

¹⁵⁴ IACHR, Case 12.270, Report No. 2/15, Merits, Johan Alexis Ortiz Hernández, Venezuela, January 29, 2015, para. 185. ECHR, Case McCann and others v. The United Kingdom. Application No. 27229/95, 27 September 1995, § 146.

¹⁵⁵ IA Court of HR. Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 80. Also see: IACHR, Case 12.270, Report No. 2/15, Merits, Johan Alexis Ortiz Hernández, Venezuela, January 29, 2015, para. 186.

¹⁵⁶ ECHR, Case McCann and others v. The United Kingdom. Application No. 27229/95, 27 September 1995, § 146.

¹⁵⁷ IA Court of HR. Case of Landaeta Mejías Brothers et al v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2014. Series C No. 281, para. 123; IACHR, Case 11.442, Report No. 90/14, Merits, Luis Jorge Valencia Hinojosa, Ecuador, November 4, 2014, para. 123.

saying that the use of lethal force must be necessary as having been justified by a State's right to protect the security of all.¹⁵⁸

191. When it is alleged that a death has resulted from the use of force, the Inter-American Court has established clear rules on the burden of proof. In the Court's own words:

(...) whenever the use of force [by state agents] results in the death or injuries to one or more individuals, the State has the obligation to give a satisfactory and convincing explanation of the events and to rebut allegations over its liability, through appropriate evidentiary elements.¹⁵⁹

192. Similarly, the UN Human Rights Committee has noted that in cases where elucidation of the facts falls exclusively on the State, the complaint can even be regarded as proven in the absence of evidence or a satisfactory explanation to disprove the claims of the plaintiffs.¹⁶⁰

193. In this regard, in order for an explanation of the use of lethal force to be regarded as satisfactory, it must be the result of an investigation in keeping with the guarantees of independence, impartiality and due diligence and, address the elements which, under Inter-American legal precedent, must be present in order to justify said use of force, namely:

i. Legitimate purpose: the use of force must be addressed at achieving a legitimate purpose. (...)

ii. Absolute necessity: it is necessary to verify whether other less harmful means exist to safeguard the life and integrity of the person or situation that it is sought to protect, according to the circumstances of the case. (...)

iii. Proportionality: the level of force used must be in accordance with the level of resistance offered, which implies establishing a balance between the situation that the agent is facing and his response, considering the potential harm that could be caused.¹⁶¹

194. Based on the foregoing, legitimate purpose, absolute necessity and proportionality of the use of force must be demonstrated by the State in light of the particular circumstances of the specific case. Moreover, as a consequence of said principles, the Commission recalls that the state agents, who intervened in operations must apply the criteria of "differentiated and progressive use of force, determining the degree of cooperation, resistance or violence of the subject against whom the intervention is intended and, on this basis, employ negotiating tactics, control or use of force, as required."¹⁶²

195. When violent circumstances have resulted in the death or injury of a person, the Inter-American Commission and Court have held that under Article 8 (right to fair trial) and Article 25 (judicial

¹⁵⁸ IACHR. Report No. 11/10. Case 12.488. Merits. Barrios Family Members. Venezuela. March 16, 2010. 91. IACHR. Report on Terrorism and Human Rights. Para. 88.

¹⁵⁹ IA Court of HR. Case of Zambrano Vélez et al v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 108; **Case of Cruz Sánchez et al v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 17, 2015. Series C No. 292, para. 291;** and IA Court of HR. Case of Landaeta Mejías Brothers et al v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2014. Series C No. 281, para. 132.

¹⁶⁰ UN, Human Rights Committee. Case of Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay. Communication No. 30/1978, UN Doc. CCPR/C/OP/1, of March 29, 1982, para. 13.3; Case of Albert Womah Mukong v. Cameroon. Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991, of July 21, 1994, para. 9.2, and Case of Turdukan Zhumbaeva v. Kyrgyzstan. Communication N° 1756/2008, UN Doc. CCPR/C/102/D/1756/2008, of July 29, 2011, para. 8.7.

¹⁶¹ IA Court of HR. Case of Landaeta Mejías Brothers et al v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2014. Series C No. 281, para. 134.

¹⁶² IA Court of HR. Case of Nadege Dorzema et al v. Dominican Republic. Merits, Reparations and Costs. Judgment of October 24, 2012 Series C No. 251, para. 85.

protection) of the American Convention, there is an obligation to conduct a prompt, serious, impartial and effective, *ex officio* investigation, which constitutes a fundamental element essential for the protection of the rights affected in such situations.¹⁶³ Said duty, in light of Article 1.1 of the American Convention, obliges the State to provide simple and prompt recourse so that, *inter alia*, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered.¹⁶⁴ Furthermore, Article 2 of the Convention requires the State to strike from the books any laws or terminate practices of any kind whatsoever which may imply the violation of the rights protected by the Convention, as well as to pass laws and develop practices designed to achieve an effective observance of the required investigation.¹⁶⁵

196. In instances when the death could have been the consequence of the use of lethal force by state agents, the European Court has held that “the most careful scrutiny” must be exercised, taking into account not “only the actions of the state agents who exercise the force, but all respective circumstances including subjects such as planning and control of the actions under examination.”¹⁶⁶ Hence, “any deficiency in the investigation that undermines its ability to establish the cause of the death or the person responsible will jeopardize compliance with this norm.”¹⁶⁷

197. With respect to due diligence in investigations of alleged extrajudicial executions, the Inter-American Court has established that “each act of the State that forms part of the investigative process, as well as the investigation as a whole, should have a specific purpose: the determination of the truth, and the investigation, pursuit, capture, prosecution and, if applicable, punishment of those responsible for the facts.”¹⁶⁸ In this regard, the State must show that it has carried out an immediate, exhaustive, serious and impartial investigation,¹⁶⁹ which must be aimed at exploring all possible lines of investigation.¹⁷⁰ The State may be responsible for not “ordering, gathering or evaluating evidence” that could be essential for proper elucidation of the facts.”¹⁷¹

198. Additionally, based on the United Nations Manual on the Effective Prevention and Investigation of Extrajudicial, Arbitrary and Summary Executions, both the Inter-American Commission and Court have specified the guiding principles that must be observed when it is believed that a death may have been due to an extrajudicial execution. State authorities conducting the inquiry shall, at a minimum, seek: a) to identify the victim; b) to recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible; c) to identify possible witnesses and obtain statements from them concerning the death; d) to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death; and e) to distinguish between natural death, accidental death, suicide and homicide. Additionally, it is crucial to conduct an exhaustive investigation of the scene of the

¹⁶³ IACHR, Report No. 85/13, Case 12.251, Admissibility and Merits, Vereda la Esperanza, Colombia, November 4, 2013, para. 242; and IA Court of HR. Case of *Kawas Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009 Series C No. 196, para. 75.

¹⁶⁴ IA Court of HR. Case of *Loayza Tamayo v. Peru*. Reparations. Judgment of November 27, 1998. Series C No. 42, para. 169; Case of *Velásquez Rodríguez v. Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1. para. 91.

¹⁶⁵ IA Court of HR. Case of *Almonacid Arellano et al v. Chile*. Judgment of September 26, 2006. Series C No. 154. para. 118; and Case of “*The Last Temptation of Christ*” (*Olmedo Bustos et al*) v. Chile. Judgment of February 5, 2001. Series C No. 73, para. 85.

¹⁶⁶ ECHR, *McCann and Others v. the United Kingdom*, Application no. No. 27229/95, September 1995, § 36.

¹⁶⁷ ECHR, *Milkhalkova and others v. Ukraine*, Application no. 10919/05, 13 January 2011, § 42.

¹⁶⁸ IA Court of HR. Case of *Cantoral Huamaní and García Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 131.

¹⁶⁹ IACHR, Report on the Merits, N° 55/97, *Juan Carlos Abella et al (Argentina)*, November 18, 1997, para. 412.

¹⁷⁰ IACHR, Report No. 25/09 Merits (*Sebastião Camargo Filho*) Brazil, March 19, 2009, para. 109. Also see, IACHR, Access to Justice for Women Victims of Violence in the Americas, OEA/Ser. L/V/II. doc.68, January 20, 2007, para. 41.

¹⁷¹ IA Court of HR. Case of the “*Street Children*” (*Villagrán Morales et al*). Judgment of November 19, 1999. Series C No. 63, para. 230. Also see, IACHR, Access to Justice for Women Victims of Violence in the Americas, OEA/Ser. L/V/II. doc.68, January 20, 2007, para. 41.

crime, and for professional experts to perform an autopsy and to carry out a test on the body that must be rigorous, using the most appropriate procedures.¹⁷²

2. Analysis as to whether the death of Mr. Ruiz Fuentes was an extrajudicial execution

199. As was established in the proven facts, Mr. Ruiz Fuentes died a violent death by firearms on December 14, 2005, almost two months after his escape from prison that same year. Based on autopsy results, the cause of death was “cerebral and pulmonary perforation by piercing wounds from firearm projectiles.” According to the autopsy report, the firearm projectile wound was from a bullet entering the right eye with a tattooed area around it and the trajectory is front-to-back. It also attests to another wound by firearm in the thorax, the trajectory of which is also front-to-back.

200. The petitioners alleged that Mr. Ruiz Fuentes was extrajudicially executed in the context of “Plan Gavilán,” which was aimed at recapturing 19 persons deprived of liberty who escaped the maximum security jail “The Little Hell,” as it was known. The State, on its own, gave contradictory versions with respect to the death of Mr. Ruiz Fuentes, noting on the record in some of its submissions that he died at the hands of third party individuals linked to crime and, in other submissions, that he had indeed died in the context of “Plan Gavilán” after resisting arrest by members of the police force.

201. On this score, the IACHR must determine whether there is sufficient evidence to establish the participation of State security agents in the death of Mr. Ruiz Fuentes and, should there be, whether the use of lethal force by said agents was justified.

202. Firstly, the Commission recalls that in the implementation of “Plan Gavilán,” seven fugitives died and that several state agents were convicted in domestic courts of committing extrajudicial executions in the context of the aforementioned Plan.

203. Secondly, present at the scene of the crimes were members of the Anti-Kidnapping Commando of the National Civilian Police under the command of Commissioner Víctor Hugo Soto Díaz, though the State failed to provide any explanation for why said group was present at the scene of the crime.

204. Thirdly, there are signs of cover-up by state agents. Based on an expert medical report, there was tampering with scene of the crime, because of “(...)2. the blood stain on the right sleeve of the sweater of the alleged victim, it can be concluded that the original position of the body was face down or ventral cubital, with his face supported on the right forearm; 3. The position of the victim to victimizer is standing face to face, aiming the barrel of the firearm at a 90-degree angle, at a distance of 15 centimeters from the victim, which is the reason why the victim blinked as a reflex (...) 4. Because of the wound received on the face the alleged victim lost consciousness and collapsed to the floor, and this is inconsistent with being able to keep holding the firearm in his right hand; (...)”

205. Fourthly and related to the last point set forth in the previous paragraph, in the police report it is noted that Mr. Ruiz Fuentes was “holding” in his right hand a 9 millimeter caliber firearm and that in one of the doors of the residence at the scene of the crime, five firearm projectile perforations of unknown caliber were seen. With regard to this fact, which is evidence that could point to a potential confrontation, the Commission raises three relevant issues. The first issue is that, during the internal investigation, it was successfully ascertained that the gun Mr. Ruiz Fuentes allegedly was holding in his hand belonged to the Ministry of the Interior and, specifically, to an officer who it indicated that he had lost his firearm, but that he did not report it. The administrative investigation into this situation did not yield any result. The second issue is that nowhere in the case file is there any record that the State conducted expert witness tests or inspections in order to prove that it was the alleged victim who set off the firearm. And the third issue is that, as was noted in the previous paragraph, the expert test concluded as one piece of evidence that proves

¹⁷² IA Court of HR. Case of Juan Humberto Sánchez v. Honduras. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 7, 2003. Series C No. 99, para.128.

tampering with the scene of the crime, that the fact that Mr. Ruiz Fuentes lost consciousness makes it impossible for him to have continued to be holding the gun in his hand, as described in the police report.

206. Fifthly, the Commission notes that the technical evidence indicates that the shot Mr. Ruiz Fuentes took in the right eye possesses tattooing around it, and therefore it can be concluded that it was fired at a short distance, which is another indication that there was no confrontation involved.

207. Sixthly and as will be further examined in the following section, the State has been unable to elucidate Mr. Ruiz Fuente's death through the judicial system and, consequently, it has not disproven all of the preceding elements of fact, which all together, lead to the conclusion of both involvement of state agents and of no confrontation.

208. Based on the foregoing considerations, the Commission concludes that Hugo Humberto Ruiz Fuentes was executed extrajudicially and, therefore, the State of Guatemala violated, to his detriment, the right to life established in Article 4.1 of the American Convention in connection with Article 1.1 of the same instrument.

3. Analysis as to whether the State met its obligation to investigate the death of Mr. Ruiz Fuentes

209. Pursuant to the proven facts, the State reported on several steps it took to investigate the death of Mr. Ruiz Fuentes. In particular, it claimed that it received statements of testimony, as well as reports from the Crime Scene Specialist Unit. It also mentioned that it identified the firearm that the alleged victim was holding in his hand, which belonged to an officer of the National Civilian Police.

210. As was noted in the previous section, there are conflicting accounts given by the State as to whether the Mr. Ruiz Fuentes death was caused by state agents. The State claimed in the internal investigation that Mr. Ruiz Fuentes was killed by two unknown individuals. Then, in processing the provisional measures before the Inter-American Court, it contended that "during his capture, Mr. Hugo Humberto Ruiz Fuentes resisted arrest, by drawing his weapon and, therefore, the agents of the Criminal Investigation Service (SIC) fired and killed him."

211. Based on available information on the internal investigations, the Commission notes that after almost 12 years have elapsed since the death of Mr. Ruiz Fuentes, the State has not used all evidentiary, technical and/or scientific means available to it in order to establish and follow up on the lines of investigation stemming from the facts cited above. What's more, the State has not even explained the measures taken by it to follow up with diligence or identify potential culprits of the supposed version of Mr. Ruiz Fuentes being murdered by two unknown individuals.

212. Specifically, the Commission highlights that, pursuant to the State's own description of the investigation, some fundamental investigative steps to aid in elucidating the facts were omitted. Namely:

- It is not on record anywhere that evidence was collected to determine whether the firearm that the alleged victim was holding in his hand had been set off, or tests such as the "gauntlet test" or "atomic absorption" analysis, to determine whether the weapon was handled by the alleged victim.
- Even though the serial number of the firearm was successfully recovered using the Fry test, and it was determined that it was the property of the Ministry of the Interior, and it was under the custody of the Third Class Officer of the National Civilian Police, no testimony of said officer is available, nor is there any explanation to clarify how Mr. Ruiz Fuentes managed to get ahold of it.
- No information appears in the case file to indicate that any attempt was made to locate the projectiles that took the life of the alleged victim and which would help to determine whether state agents were involved in the incidents.

- No investigative step was taken either to reenact the events and trajectories of the bullet shots, taking into account as well that the type of wounds indicate that the shots were fired at close range.
- There is no evidence that statements of the Chief of the Anti-Kidnapping and Homicide Unit of the Directorate of Criminal Investigation of the National Civilian Police or of the Director of said unit were obtained for the purpose of finding out the reasons why they were present at the scene of the crime, or details of "Plan Gavilán," including the identity of the seven individuals who died in said Plan.
- There is no information either about the taking of the statement of the eye witnesses to the crimes.

213. Furthermore, even though it was established in an expert's report that the scene of the crime had been manipulated, no follow up investigation was conducted into this situation in order to establish the circumstances of said manipulation or the persons responsible for it. Likewise, the evidence of cover-up was not investigated either.

214. Based on the foregoing considerations, the Commission finds that the criminal investigation has not been diligent or effective to elucidate the facts within a reasonable period of time and establish responsibility. Accordingly, the Commission finds that the State is responsible for the violation of the rights established in Articles 8.1 and 25.1 of the Convention in connection with Article 1.1 of the same instrument, to the detriment of Hugo Humberto Ruiz Fuentes, as well as his next-of-kin.

V. CONCLUSIONS

215. The Commission concludes that the State of Guatemala is responsible for the violation of the right to life, humane treatment, a fair trial and judicial protection established in Articles 4.1, 4.2, 4.6, 5.1, 5.2, 8.1, 8.2 c), f), g), h) and 25.1 of the American Convention in connection with Articles 1.1 and 2 of the same instrument, to the detriment of Hugo Humberto Ruiz Fuentes. The Commission also concludes that the State of Guatemala is responsible for the violation of the right to humane treatment, a fair trial and judicial protection established in Articles 5.1, 8.1 and 25.1 of the American Convention in connection with Article 1.1 of the same instrument, to the detriment of the next-of-kin of Hugo Humberto Ruiz Fuentes. Lastly, the Commission concludes that the State of Guatemala violated Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

VI. RECOMMENDATIONS

216. Based on the foregoing conclusions,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THE GUATEMALAN STATE,

1. To provide full reparation for the human rights violations declared in the instant report both in the material and non-material aspect. The measures of reparation must include fair compensation as well as measures of satisfaction and rehabilitation, when relevant, in consultation with the members of the family of Mr. Ruiz Fuentes.

2. To investigate the acts of torture endured by Mr. Ruiz Fuentes in a diligent, effective manner and within a reasonable period of time in order to thoroughly elucidate the facts, identify the perpetrators and impose the appropriate punishments.

3. To investigate the extrajudicial execution inflicted on Mr. Ruiz Fuentes in a diligent, effective manner and within a reasonable period of time in order to thoroughly elucidate the facts, identify the perpetrators and impose the appropriate punishments.

4. As to the death penalty, the Commission takes note and a positive view that for the past 17 years said penalty has not been imposed by the judicial authorities and that commutation of the sentence has been ordered for more than a decade for persons previously condemned to die. Likewise, the Commission takes note and views positively that the Executive Branch has for many years adopted measures to keep the death penalty from being reinstated in Guatemala. In this regard, the Commission notes that as a consequence of actions taken by both the Executive Branch and the Judiciary, 17 years have elapsed without any imposition or execution of the death penalty in Guatemala. The Commission understands that, in practice, the State of Guatemala has moved toward an abolitionist stance with regard to the death penalty, which is consistent with the spirit of the American Convention on the subject matter. By virtue of the foregoing, taking into account the practice of almost two decades, the Commission recommends the State of Guatemala to adopt the necessary measures so that domestic legislation is consistent with said practice and thus continue down the road toward abolition of the death penalty.

5. To adopt legislative, administrative and other measures necessary to ensure that in regulations and practice, persons convicted in criminal proceedings have a remedy available to them before a hierarchical authority to allow for full review of the judgment of conviction.

6. To adopt administrative and other measures aimed at training security forces on the absolute prohibition of torture. Likewise, the State should conduct training on the use of force in keeping with international standards in the context of operations to capture persons deprived of liberty who have escaped from detention facilities.